No. 280.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

INTEGRAL QUICKSILVER MINING COMPANY,
Plaintiff in Error,
vs.
ALTOONA QUICKSILVER MINING COMPANY,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ in Error to the Circuit Court of the United States for the Northern District of California.

INDEX.

In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.
} At Law.

Complaint.

The said plaintiff, by Messrs. Cross, Hall, Ford & Kelly, its attorneys, complains of the said defendant, and for cause of complaint alleges:

I.

That the said plaintiff is, and for more than twenty years last past has been. a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

II.

That the said defendant, Integral Quicksilver Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and having its principal place of business at the city of New York, in the State of New York.

III.

That the place of residence of said plaintiff is in the State of California, and that the place of residence of the said defendant is outside of the State of California, and within the United States.

IV.

That the said plaintiff is the owner of, and entitled to the possession of, and prior to the wrongful acts of the defendant hereinafter alleged had been for more than fifteen years in the notorious, peaceable, continuous, adverse possession of, those two certain ditches, and the water rights appurtenant thereto (and during all of said time paid all of the taxes, State, county, and municipal assessed thereon) described as follows:

1. The Altoona Ditch, sometimes called the Crow Creek Ditch, a ditch taking water out of Crow Creek, in the county of Trinity, State of California, and running and extending thence, by the way of Wiltz Ravine (and also taking water therefrom), to the Altoona Quicksilver Mines, in said Trinity County.

2. The Boston Ditch, also taking water from said Crow Creek, and running thence across Wiltz Ravine (and taking the water therefrom), and extending thence and therefrom to the said Altoona Quicksilver Mines.

3. The right to receive from said Crow Creek and said Wiltz Ravine, and to divert therefrom, by means of said ditches, all of the water flowing in said Crow Creek and said Wiltz Ravine, not exceeding the capacity of said Altoona Ditch and Boston Ditch, to receive and convey

the same to the said Altoona Quicksilver Mines. Said water rights being of the extent of five hundred miners' inches of running water, measured under a four-inch pressure, and being the first and prior right to divert waters from said Crow Creek and Wiltz Ravine.

V.

That, for more than five years, viz: for about fifteen years next preceding the wrongful acts of the defendant hereinafter alleged, the said plaintiff and its grantors, have been in the notorious, continuous, exclusive, adverse possession of the said Altoona and Boston ditches, and of the said water right, using and appropriating the same to its own use and for its own purpose, and claiming the same adversely to all the world, and during all of said time has paid all of the taxes, State, county, and municipal, which have been levied and assessed thereon.

VI.

That, whilst said ditches and water rights were so in the possession of the said plaintiff, and on or about the 29th day of August 1893, the said defendant, the Integral Quicksilver Mining Company, by its officers, agents, and employees, wrongfully and unlawfully, and against the will of said plaintiff, and without any right whatever, entered into and upon the said Crow Creek and Wiltz Ravine and said Boston Ditch, and took possession of said Boston Ditch, and in, and through it, diverted and turned all of the water coming to the head of said Boston Ditch, and to said Boston Ditch where it crosses said Wiltz Ravine, and turned all of the water away

from said Altoona Ditch, and conducted and conveyed the same away from the plaintiff's mines and reduction works, where the said plaintiff was accustomed to use and had use for the same, and ousted and ejected the said plaintiff from the said Boston Ditch and the said water rights, and deprived the said plaintiff of the possession thereof, and appropriated the same to its, the said defendant's own use, and has ever since continued wrongfully and unlawfully to withhold the possession of the said Boston Ditch, and the said waters and water rights from the said plaintiff, and without right, and wrongfully, the said defendant still holds and withholds from the plaintiff the possession of the said Boston Ditch, and of the said waters and water rights to the injury of said plaintiff in the sum of five thousand dollars.

VII.

That the value of said Boston Ditch and of the said waters and water rights so wrongfully taken possession of and withheld by said defendant from said plaintiff is more than two thousand dollars.

VIII.

That the said ditches, waters and water rights, and Crow Creek and Waltz Ravine, and Altoona Quicksilver Mines, are all situated in the county of Trinity, State of California, and within the said Northern District of California.

Wherefore, the said plaintiff prays judgment for the possession of said Boston Ditch, and of said water rights,

and for damages in the sum of five thousand dollars, and for its costs of suit.

CROSS, HALL, FORD & KELLY, and
NAPHTALY, FRIEDENRICH & ACKERMAN,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco, } ss.

Charles Allenberg, being first duly sworn according to law, deposes and says: That he is the secretary of the said plaintiff, the Altoona Quicksilver Mining Company, a corporation; that he has heard the foregoing Complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to them he believes it to be true.

Charles Allenberg.

Subscribed and sworn to before me this 4th day of December, A. D. 1893.

[seal] L. Meininger,
Notary Public.

[Endorsed]: Filed December 4, 1893. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY, Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY, Defendant.
} At Law.

Answer.

Comes now defendant, the Integral Mining Company, and for answer to the Complaint of plaintiff herein alleges, admits, and denies as follows:

I.

Defendant admits paragraph I of said Complaint.

II.

Defendant admits paragraph II of said Complaint.

III.

Defendant admits paragraph III of said Complaint.

IV.

Defendant denies, upon his information and belief, that plaintiff is, or that it was at any of the times in Complaint mentioned, or ever was, the owner of or entitled to the possession of the Altoona Ditch, sometimes called the Crow Creek Ditch, in the county of Trinity, State of

California, running and extending thence by way of the Wiltz Ravine to the Altoona Quicksilver Mines in Trinity County, or taking water therefrom, or that plaintiff is now or ever was such owner of any part or portion or parcel thereof.

Denies upon like information and belief that plaintiff was or has been for more than fifteen years, or for any time whatever prior to the commencement of this action, in either the notorious, peaceable, continuous, or adverse possession of said Altoona Ditch, as in Complaint described, or any part or portion thereof, or that during all or any of said times plaintiff has paid all or any of the taxes, either State, county, or municipal, assessed upon said Altoona Ditch aforesaid.

V.

Defendant denies that plaintiff is, or that it was at any of the times in the Complaint mentioned, or that it ever was, the owner of or entitled to the possession of the Boston Ditch, taking water from said Crow Creek, and running thence across Wiltz Ravine, and extending thence and therefrom to the Altoona Quicksilver Mines, and taking the water therefrom to said mines, as in Complaint described, or that plaintiff is now or ever was such owner of any part, portion, or parcel of said ditch as therein described.

Denies that plaintiff is, was, or has been for more than fifteen years, or for any time prior to the commencement of this action, in either the notorious, peaceable, continuous, or adverse possession of said Boston Ditch, as in Complaint mentioned and described, or any part or

portion thereof, or that during all or any of said times plaintiff was paid all or any of the taxes, either State, county, or municipal, assessed upon Boston Ditch aforesaid.

VI.

Defendant denies that plaintiff is the owner of or entitled to the right to receive from Crow Creek or from Wiltz Ravine, or to divert therefrom by means of the ditches in the Complaint mentioned, or by means of either of them, all or any of the waters flowing in said Crow Creek or in said Wiltz Ravine, not exceeding the capacity of said Altoona Ditch and Boston Ditch, or that he is entitled to any such right whatever to take any of said waters, or to receive or convey the same to said Altoona Quicksilver Mines.

Defendant denies upon its information and belief that plaintiff has any water rights in or to the waters of said Crow Creek or said Wiltz Ravine to the extent of five hundred miners' inches, running water measure under a four-inch pressure, or that it has any such right whatever. And denies that said alleged right of plaintiff is the first or prior right to divert waters from said Crow Creek and Wiltz Ravine, or that plaintiff has any such right to divert any of such waters.

VII.

Defendant denies that plaintiff or its grantors, or either of them, have been in either the notorious, continuous, exclusive, or adverse possession of said Altoona or Boston ditches for more than five years next preceding the alleged acts of said defendant as in Complaint al-

leged, or that it or its grantors had or has been in such possession for fifteen or for any number of years whatever, or that it or its grantors has ever been in such or any possession of the water rights alleged in Complaint to be appurtenant to said ditches, or to either of them, for five or for fifteen years, or for any time whatever. And denies that during all or any of said time aforesaid plaintiff has paid all or any of the taxes, State, county, or municipal, that have been levied or assessed upon or against said property.

Denied that plaintiff has been in such possession of said water rights, or that it has been using or appropriating said water rights for its own use and purposes, or claiming the same adversely to all of the world during said time aforesaid, or during any part or portion thereof, or that plaintiff has at any of said times, or during any of the times in Complaint mentioned, paid any of the taxes, State, county, or municipal, which have been levied or assessed upon said property.

VIII.

Defendant denies that while the said ditches in the Complaint described were in the possession of plaintiff, or on or about the 29th day of August, A. D. 1893, or at any other time, the defendant, the Integral Quicksilver Mining Company, by any of its officers, agents, or employees, either wrongfully or unlawfully or against the will of plaintiff, or without any right whatever, or that they ever or at all, entered into, in, or upon said Crow Creek and Wiltz Ravine and took possession of said Boston Ditch, or that defendant ever took possession of said

Boston Ditch at all except as herein stated. Denies that they turned all of the water coming down to the head of said Boston Ditch, or to said Boston Ditch where it crosses Wiltz Ravine, or that they turned all or any of the water away from said Altoona Ditch, or that they conducted the same away from plaintiff's mines or reduction works, except as herein stated. Denies that plaintiff or its grantors were accustom to use or had used any of the waters of Crow Creek or Wiltz Ravine that flowed through said Boston Ditch for any mines or reduction works, or for any other purpose, for more than twelve years next before the commencement of this action, if in fact plaintiff ever did use any of such waters. Denies that defendant ousted or ejected plaintiff from said Boston Ditch or from the possession thereof, or deprived it of the possession thereof for the reason that plaintiff was not and has not been in the possession of said ditch or of any of the water rights appurtenant thereto or connected therewith for more than twelve years last past.

Defendant admits that it has appropriated the waters of said Crow Creek and Wiltz Ravine that flow through said Boston Ditch to its own use, and that it now does so and was so doing at the time of the commencement of this suit, and alleges that it had done so for more than five years next before the commencement of this action, but denies that it does so without right or wrongfully or unlawfully. Admits that defendant still holds and withholds from the plaintiff the possession of the said Boston Ditch and of the water rights connected therewith, but denies that they withhold any of the other water rights

in Complaint mentioned from plaintiff or from any other person.

Denies that plaintiff is or was, or has been, injured by an holding or withholding of any ditch or water rights from it by defendant in the sum of five thousand dollars, or in any sum or amount whatever.

IX.

Defendant admits that the value of said Boston Ditch and of the water and water rights is two thousand dollars, but denies that the same were wrongfully taken possession of by or withheld by defendant from plaintiff.

X.

And for a further answer herein defendant alleges: that defendant and its grantors have been engaged in the business of mining and retorting quicksilver in the county of Trinity, State of California, for more than ten years last past, next before the commencement of this suit, and defendant further alleges upon its information and belief that long prior to the year A. D. 1880 said Boston Ditch and water rights connected therewith as in the Complaint described were used in connection with the operation of certain mining claims situated in Trinity County, State of California, and said water was diverted from said streams and carried to said mines and mining claims by means of said Boston Ditch, and said water, to the amount of two hundred and fifty miners' inches, was so diverted, appropriated and used in and about said mines and mining claims. And defendant further avers upon its information and belief that for two years, or thereabouts, prior to the year A. D. 1880, to wit, in the year 1878, said

mining claims, said Boston Ditch, and said water and water rights were abandoned, and said water ceased to flow through said ditch at the head thereof, and the said ditch, dams, and everything connected therewith were permitted to go to ruin and decay, and said ditch and said water ceased to be used for any useful or beneficial purpose whatever. That while said ditch and said water and said water rights were so abandoned and were not being used for any purpose whatever, defendant, its grantors and predecessors in interest, entered into and upon said ditch, repaired the same, and appropriated the water of said streams, Crow Creek and Wiltz Ravine, to the amount of two hundred and fifty miners' inches, to the full capacity of said ditch, and defendant, its grantors and predecessors in interest, have thence hitherto up to this date, and up to the date of the commencement of this action, have been in the open, notorious, peaceable, continuous, and uninterrupted possession of said Boston Ditch, and the water and water rights connected therewith, as herein described, and have ever since said time been using said ditch, water, and water rights, under claim of right and title thereto, against the world, for useful and beneficial purposes, to wit, in the running and retorting of quicksilver, and that defendant, its grantors and predecessors in interest, have paid all the taxes, State, county, or municipal, that have been levied or assessed upon said property or upon any part or portion thereof.

And for a further and separate answer herein defendant alleges:

I.

That defendant is the owner of and entitled to the possession of said Boston Ditch, and said water and water rights appurtenant thereto and connected therewith, to wit, 250 miners' inches of the waters of Crow Creek and Wiltz Ravine to the full capacity of said Boston Ditch, and that defendant, its grantors and predecessors in interest, have been in open, notorious, peaceable, continued, exclusive and uninterrupted possession of said Boston Ditch, and the water and water rights connected therewith, to wit, the waters of Crow Creek and of Wiltz Ravine to the full capacity of said ditch, to wi t: two hundred and fifty miners' inches thereof flowing under a four-inch pressure, and have appropriated and used the same under claim of right and title thereto exclusive of any other right, to wit, for the purpose of mining, for more than five years next before the commencement of this action, and have ever since said time paid all the taxes State, county or municipal that have been levied upon said property.

And for further and separate answer defendant alleges that long prior to the commencement of this action defendant, its grantors and predecessors in interest, posted in a conspicuous place upon said Crow Creek, to wit, at the head of said Boston Ditch, and at the place where said head of said ditch intersects the bank of said Crow Creek, a certain notice in writing, stating:

"WATER LOCATION.

"Notice is hereby given that the undersigned claims "the water flowing in this stream (Crow Creek) to the

" extent of two hundred and fifty (250) inches, measured " under a four-inch pressure.

" The purpose for which I claim said water is for " mining, milling, and domestic purposes on Cinnabar " Mountain between this notice and the confluence of the " water of the east fork of Trinity River and the north " fork of the east fork Trinity River.

" I intend to divert the water by means of a dam " across Crow Creek, about three hundred feet from a " lake and in a ditch cut two feet wide on the bottom, " three feet wide on top, and two feet in depth, on a " grade of one-half of one inch to the rod in length of " ditch.

" I also claim the water of the Wilt Gulch at the point " where this ditch line crosses said Wilt Gulch, to keep " up the head of water to the full head of two hundred " and fifty inches in said ditch at this point. The said " water to be used for the same purposes and at the same " places as aforesaid stated in the claim of the water " from Crow Creek.

" Located on the ground this 2nd day of May, 1892.

" Alexander McCaw.

" Witness location:

" Louis N. Girard."

That at the time of the posting of said notice no other person, persons, or corporations had posted any notice claiming the right to appropriate any of the waters of said Crow Creek or Wiltz Ravine under the provisions of title VIII of the Civil Code of the State of California. That thereafter, to wit, on the 3rd day of May, A. D. 1892,

the said defendant, its grantors and predecessors in interest, caused said notice to be recorded in the records of Trinity County, State of California, in Book No. 1 of Water Notices, at page 236.

And that ever since the posting and recording of said notice, defendant, its grantors and predecessors in interest, have continued to use the water of said streams to the full capacity of said Boston Ditch, to wit, to the amount of two hundred and fifty miners' inches under a four inch pressure, for useful and beneficial purposes, to wit, for the purpose of mining, retorting, and refining quicksilver in the State of California.

And for a further and separate answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

And for a further and separate defense herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 319 of the Code of Civil Procedure of the State of California.

And for a further answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of section 325 of the Code of Civil Procedure of the State of California, and by the provisions of subdivisions "first" and "second" thereof.

And for a further and separate answer herein defendant alleges that plaintiff's alleged cause of action is barred by the provisions of subdivision "2" of section 338 of the Code of Civil Procedure of the State of California.

And for a further and separate answer herein defend-

ant alleges that plaintiff's alleged cause of action is barred by the provisions of section 323 of the Code of Civil Procedure of the State of California, and by the provisions of subdivisions "one," "two," "three," and "four" thereof.

Wherefore, having fully answered, defendant asks to be hence dismissed, and that plaintiff take nothing by reason of this action, and that defendant have judgment for its costs, and for all other and proper relief.

REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Alexander McCaw, being duly sworn, deposes and says, that he is an officer of the Integral Quicksilver Mining Company, defendant in the above-entitled action, to wit, Superintendent and General Manager thereof; that he has read the above and foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and, as to those matters, that he believes it to be true.

ALEXANDER MCCAW.

Subscribed and sworn to before me this 10th day of January, 1894.

[SEAL] CHAS. H. PHILLIPS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service of within Answer admitted this 11th day of Jan., 1894. Cross, Hall, Ford & Kelley, Attorneys for Plaintiff. Filed, January 11th, 1894. W. J. Costigan, Clerk.

United States of America.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Altoona Quicksilver Mining Company (a Corporation), Plaintiff, vs. Integral Quicksilver Mining Company (a Corporation), Defendant.	No. 11872.

Verdict.

We, the jury, find in favor of the plaintiff.

J. C. Johnson,
Foreman.

[Endorsed]: Filed October 5, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, in and for the Northern District of California.

THE ALTOONA QUICKSILVER MINING COMPANY (Corporation),
Plaintiff,
vs.
THE INTEGRAL QUICKSILVER MINING COMPANY (a Corporation),
Defendant.

Judgment on Verdict.

This action came on regularly for trial on the 11th day of September, A. D. 1895. The said parties appeared by their attorneys, Messrs. Cross, Ford, Kelly & Abbott, counsel for the plaintiff, and Messrs. Reddy, Campbell & Metson, counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined, and documentary evidence was introduced. During the trial of the cause the counsel for the defendant formally stated in open Court that the said defendant did not claim, and does not claim, the Altoona Ditch, or any water right appurtenant to it. At the conclusion of the evidence the counsel for the plaintiff formally withdrew all claim for damages. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court with the verdict, signed by the foreman, and,

being called, answered to their names, and say, "We, the jury, find in favor of the plaintiff."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff have and recover from the said defendant the possession of the Boston Ditch described in the Complaint in said action, and all rights appurtenant to said Boston Ditch; taking water from Crow Creek and running thence across Wiltz Ravine (and taking the water therefrom), and extending thence and therefrom to the Altoona Quicksilver Mines, said ditch being situate in Cinnabar Mining District, Trinity County, California, and the sum of $\$37\frac{10}{100}$ taxed as costs.

Entered October 5th, 1895.

W. J. COSTIGAN,
Clerk.

A true copy.

Attest: W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Altoona Quicksilver Mining Company (a Corporation),

vs.

Integral Quicksilver Mining Company (a Corporation).

No. 11872.

Certificate to Judgment Roll.

I, W. J. Costigan, Clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern

District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 5th day of October, 1895.

[SEAL] W. J. COSTIGAN, Clerk.

[Endorsed]: Judgment Roll. Filed Oct. 5th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY, Plaintiff,

vs.

INTEGRAL QUICKSILVER MINING COMPANY, Defendant.

Substitution of Attorney for Defendant.

E. W. McGraw, Esq., is hereby substituted as attorney for the defendant in the above-entitled action in our place and stead.

Dated Oct. 14, 1895.

REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

I hereby accept the substitution of myself as attorney for the defendant in the above-entitled action in the place and stead of Reddy, Campbell & Metson.

Dated November 4, 1895.

E. W. McGRAW.

[Endorsed]: Filed Nov. 4, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the July term. A D. 1895, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, Circuit Judge.

ALTOONA QUICKSILVER MINING CO.
vs.
INTEGRAL QUICKSILVER MINING CO. } No. 11,872.

Order for Substitution of Attorney.

Upon motion of E. W. McGraw, Esq., attorney for defendant, and upon filing substitution of attorney, it is ordered that said E.W.McGraw, Esq., be and he hereby is substituted as attorney for the defendant herein, in place and stead of Messrs. Reddy, Campbell & Metson.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Bill of Exceptions.

Be it remembered, that on September 12th, 1895, the above-entitled cause came on for trial before the Court and a jury duly impaneled.

The plaintiff, to sustain the issues on its part, offered and read in evidence the deposition of A. W. Hawkett, the evidence of which witness tended to prove: That he was one of the parties who originally located what is now known as the Altoona Quicksilver Mining Claim. That he first went to the vicinity of the mine in 1871, and prospected for cinnabar, which is the ore of quicksilver. That he had two partners by the name of John A. Lytle and James McKinley Crow. We went there in 1871 and posted up the notice of location in 1872. It was so posted that the elements would naturally destroy it. We caused the notice to be recorded at the County Clerk's office, Weaverville, where it was customary to record mining notices in that county. I believe the certified copy of the record shown me to be a copy of the notice we posted. That

Hawkett and his co-locators continued in possession of the Altoona and Trinity claims till August, 1875, and in the mean time dug a ditch from Crow Creek to supply their claims with water, which ditch was known by the name of the Crow Creek Ditch. That no other ditch had been constructed in 1875. That the ditch was built for the purpose of concentrating ore on the Altoona ground. We needed the water to sluice out and concentrate the ore. We would have had to pack the ore eight miles to work it unless we concentrated in at the mine, and so we concentrated as closely as we could. That was to get the quicksilver out of the ore. That it was completed in the spring of 1875—May or June of that year. I saw another ditch there when I was at the mine four years ago. It had not been constructed and there was no other ditch there, excepting the one we built when I left there in 1875. When I left, the Crow Creek Ditch took all the water, and then we did not have enough to sluice with. We made holes there and got rockers to utilize the water in this way. It takes more water to sluice with than it does to rock with. We were using all of the water of the creek. We had the ditch dug, but Chinamen did the digging. Mr. Lytle and myself paid for it. The ditch was built to concentrate our ore and work the ground on the Altoona claim. I think the ditch was completed in May or June, 1875, and we continued to use the water from the ditch until we sold out to Mr. Zellerbach, in August, 1875. That the ditch he dug was about one and a half feet on the bottom, two and a half feet on top, and about a foot and a half deep. I often walked along the ditch when

the water was running in it. The water ran about as fast as a man would walk. That in that ditch there would not be any water in the winter if there was much snow there; from the spring it would last up to August that year after the snow went off. That is the only year I know about. That as long as the witness was there the water in the Altoona Ditch was used on the Altoona mine. That during the time he, witness, was there, they used all the water that came down Crow Creek to the head of the ditch. That the witness sold out and left there in August, 1875.

Plaintiff then offered in evidence the notice of location of the Trinity mining claim by John A. Lytle, A. W. Hawkett, and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, Cal., Aug. 15th, 1872, to the introduction of which notice in evidence defendant objected, on the ground that the same was irrelevant, incompetent, and immaterial.

The objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Also, by the same witness, plaintiff offered evidence tending to prove: Crow left there in 1873. Mr. Lytle continued to work on the mine until I left. We used the water all the time as long as I was there. When there wasn't water enough to fill the ditch we took all the water that came to the head of the ditch. That after 1875 witness did not return to that vicinity again until 1890. That at that time the ditch he built looked about the same as it did when he built it. That

the water flowing in Crow Creek was about the same as when he was there previously. That at different seasons of the year the waters of Crow Creek varied from four or five hundred inches to a few inches. That the capacity of the Crow Creek Ditch was about four hundred inches. That the water of Crow Creek is lowest in August and September.

Plaintiff offered in evidence a deed dated August 1, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder s office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date and recorded in the County Recorder's office of Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A.W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County October 19, 1874. To each of which conveyances defendant objected, on the ground that the same were irrelevant, immaterial, and incompetent; which objections were overruled by the Court; to which rulings of the Court defendant, by its counsel, duly excepted.

At ordinary stages of water in Crow Creek there is from about 1000 down to 100 miner's inches of water

running in Crow Creek. When I left there in August, 1875, all of the water of Crow Creek was running into the ditch. I think the ditch carried four or five hundred inches. The water is the lowest in those mountain streams in August and September. I remember the condition of the water there, because we were short of water at the mine and needed the water. That season we sluiced there for awhile, whilst we had water enough to sluice with and run the undercurrents.

Plaintiff next introduced as a witness Patrick Horan, whose evidence tended to prove: I worked for the Altoona Quicksilver Mining Company. At first I worked for Mr. Hawkett and Mr. Lytle. That he began work on the Altoona Mine about June, 1875, and discontinued working there in the fall of 1879. That he knew the Crow Creek Ditch, otherwise called the Altoona Ditch. That it heads in Crow Creek. That Wiltz Ravine empties into Crow Creek Ditch. That Crow Creek Ditch took its water from Crow Creek and Wiltz Ravine. That when he was there in 1875 there was no other ditch out of Crow Creek or Wiltz Ravine. That while he was there the water of the Crow Creek Ditch was used on the Altoona Mine for concentrating the ore, on retorts, for condensing, and for drinking purposes. We run the water until it froze up in the ditch. I tended the Crow Creek Ditch. It was also known as the Altoona Ditch. It took water both from Crow Creek and Wiltz Ravine. I did not know of any other ditch taking water from Crow Creek or Wiltz Ravine in 1875. The Altoona Ditch was about two feet and a half wide on the top, about 18 inches wide on the bottom,

and about 18 inches deep. The Altoona Ditch took all the water from Crow Creek and Wiltz Ravine in low stages. The concentrating was done by hydraulic piping. We piped against the bank and cut the dirt all away and washed it down into the sluices. That he first knew about the Boston Ditch in 1876. That the Boston Ditch headed at Wiltz Ravine and runs along to the old Boston Mine, and extends on down three or four hundred yards—I don't know the exact distance—to where we had a reservoir to save the water in when the water got too scarce in the fall of the year. Then we run the water into the Altoona Ditch so as to keep our pipe a going, and it was used at the Altoona Mine. I helped dig that portion of the Boston Ditch for the Altoona Quicksilver Mining Company. As near as I can tell, that was in 1876. It might have been a year or two earlier or later. That he does not know the proportions of the ditch that runs from Crow Creek to Wiltz Ravine. That whilst he was there they ran the water from Boston Ditch first to a reservoir, and then into the Altoona Ditch, so as to keep the pipe a going. That the Altoona Quicksilver Mining Co. extended the Boston Ditch from the Boston Mine down to the reservoir. That the Boston ditch was about a foot in diameter on the bottom, and the water ran three or four or five inches deep—small head. It took all the water there was in Wiltz Ravine at that time at the head of the ditch. That the upper or Boston Ditch took the water higher up than the Altoona Ditch. When the Boston Ditch doesn't take the water from Wiltz Ravine or Crow Creek, the water empties into the

Altoona Ditch. That he had used the water of the Boston Ditch for piping one season before he left. That about July, 1876, witness built the extension of the Boston Ditch from the Boston Mine down to the reservoir. That he used the water from the Boston Ditch the same season.

That it was after the Boston Mine stopped that the extension of the Boston Ditch was built. That while the Boston Mine was worked, the water of the Boston Ditch was used on that mine. That he did not use any of the water out of the reservoir in 1877, 1878, or 1879. The season of lowest water is from the middle to the latter part of August, and the month of September. That the witness visited and examined the ditches last year, and that they are about the same size now as when he knew them. There wasn't quite as much water in the Boston Ditch then as when he knew it.

Plaintiff next offered the evidence of John A. Lytle, tending to prove: That he was first in the Cinnabar Mining District in 1872. In 1874 I posted a notice on the Altoona Quicksilver Mining Claim, claiming that claim for mining purposes. I caused a record of it to be made in the county records of Trinity county, where it was customary to record mining notices for that district at that time. Witness is shown a certified copy from the records of Trinity County, and testifies that he believes that to be a copy of the notice posted; that it was made out by the United States Deputy Mineral Surveyor, Mr. Lowden, on the ground, and that either the witness posted it or Mr. Lowden posted it for him; that it was done under the witness' orders and pay. After

posting that notice we went to work on the two Altoona claims, Mr. Hawkett and myself. The two locations are adjoining. We worked on those two claims, the Trinity claim and the Altoona claim, concentrating ore. Cinnabar had been discovered on both of the claims before the locations were made. Hawkett and I discovered them. We were working together as partners. That while we were working on the Altoona and Trinity claims, we got water from the Crow Creek Ditch. That the ditch was built by Hawkett and himself. That the Crow Creek Ditch was built by them in 1873 or 1874. That while the ditch was used, it was used for concentrating cinnabar ores. We first took the ores out of the mine, and then we shoveled the ore into sluices, and by running the water through them and wash away all the gangue and slimes, and the cinnabar, like gold, being heavy, it settled in the riffles, and then we would clean it up. We had two lines of sluices side by side. We would concentrate it from four or five per cent down to ninety per cent of cinnabar. The sluices had a grade of 12 inches to 12 feet. That its water failed late in the year. That there was scarcely any water in Crow Creek Ditch late in the year, and none at all in winter. That in the spring of the year, when the snow melts, they had more water in Crow Creek than the ditches would carry; by the latter part of August or the first of September we could get only a few inches of water through the ditch. We could use it there for a good many purposes around the mine. We used it on the condensers. There was water enough for rocking at almost any season of the year. At almost

any season of the year there could be water procured for rocking. When the ditch was full of water the water run about two and a half miles an hour.

That the witness in July, 1875, turned over the Altoona mines to M. Zellerbach. That the witness practically delivered possession to Zellerbach when he sold out. After I left there in 1875, I went up there to work for the Altoona Quicksilver Mining Company again in the summer of 1888. I cleaned out the shaft and retimbered it, retimbered the tunnel, graded around the shaft for a hoisting works, burned a brick kiln, repaired the roads, and did some other work. I went up there about the first of August and worked until about the first of October. Then we shut down the work, and I left some men in charge of the mine, and they stayed there all winter. I went there again the next March, but only stayed two or three days. At that time I found the gang of men there that opposed my working. When I was there in 1888, I was superintendent, and had 24 or 25 men working under me on these mines and the brickyards and roads. All of that work referred to the working of the mines. At that time I used what little water there was for making brick to build a furnace to reduce the quicksilver ores. That water came from the Altoona Ditch. But there was very little water in the ditch. We quit work in October, 1888, for want of funds to go on with. When I went there in 1889 to work I was employed for the Altoona Quicksilver Mining Company by Mr. Zellerbach. I took four or five men with me for a starter. We were there a week or ten days. Then we got into trouble with some other

men who represented the Altoona Company also. We had a controversy, and I went to Weaverville about it. They stopped some of our teams on the road loaded with machinery. I went to Weaverville to invoke the authority of the law. The attorneys there did not seem to give me any encouragement about taking a hand in it, and the amount of it was that it kind of flummuxed out. While I was in Weaverville I heard there was an injunction out, but it was not served on me. I quit work because I found an armed force of men there resisting my working, and found that I had no support from the men supposed to be the officers of the company, neither any means or advice or counsel, that seemed to have any reason or sense about it, so I quit. I never was there again except in June, 1893, I went to examine the Central claim. Thatat the time the Altoona or Crow Creek Ditch was built there was no ditch taking water above the heading of that ditch. We took the first water that was taken out of Crow Creek, in the Altoona or Crow Creek Ditch. The Boston Ditch was built afterwards. We run water in the Altoona Ditch long before the Boston Ditch had any work commenced on it at all. In 1888, in August, we could hardly get enough water out of those streams to run our brickyard. They were not running the Boston Mine or the Upper Ditch at all at that time. I think we got from ten to fifteen inches. In March, April, and May, when the snow is melting, there is a large amount of water goes down that creek. We had water running through the Altoona Ditch for a year before I left the mine in 1875. When I went back to the mine in

1888 it didn't look like a deserted mine, because there was a man there working on the mine, washing and concentrating ore. They were using the water out of the ditch, and had been using water there. When I got there Mr. Girard was working on the Altoona Mine. I went up the ditch pretty near to its head. I went along the ditch three or four times in 1888 and once in 1889. That the witness was not at the Altoona Mines from 1875 to 1888. That he went back there in 1888 to reopen the Altoona Mine. That in 1888 the Boston Ditch from the north fork of Crow Creek to Wiltz Ravine was all out of repair. That in 1888 they were not running water through the Boston Ditch to the Boston Mine while I was there, but might be during that season. That he thought there was no water in the ditch when he was there from the Boston Mine to the Altoona Mine. There might have been water there before I got up there, but I didn't see it. That Butler was in possession of the Boston Mine in 1888. That in 1888 there was an old ditch from the Boston Mine to the Altoona Mine, but there was no water in it. I crossed the Boston Ditch once in 1888, and that was the latter part of August. That it was in the latter part of August when he was up there. That the Altoona Ditch was built before the Boston Ditch.

In connection with the testimony of this witness, plaintiff offered in evidence the Notice of Location of the Altoona Mine, by John A. Lytle, September 26th, 1874, and recorded in the office of the Recorder of Trinity County, October 15th, 1874, which was objected to by defendant

as immaterial, irrelevant, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, duly excepted.

Plaintiff offered in evidence a series of mesne conveyances: a deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver Mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity claim, as located by Hawkett, Crow, and Lytle, acknowledged July 7, 1875, and recorded July 19, 1875, in the Recorder's office of Trinity County. Also a deed from A. W. Hawkett to Mark Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the county records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona Mine, one-half of the Trinity Mine, and one-half of the Crow Creek Ditch. Also deed from Lytle, Hawkett, and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona claim, the Trinity claim, and the Crow Creek Ditch and water rights, to each of which said conveyances defendant, by its counsel, objected, on the ground that it was immaterial, irrelevant, and incompetent. The objections were overruled by the Court, to which ruling of the Court defendant, by its counsel, duly excepted.

Plaintiff offered in evidence the Articles of Incorporation of the Altoona Quicksilver Mining Company, dated

August 24, 1875, duly filed in the County Clerk's office of Trinity County, and in the office of the Secretary of State of the State of California; also the certificate of incorporation of the plaintiff, duly certified by the Secretary of State, and dated September 23, 1875. Also a deed from M. Zellerbach to plaintiff, dated August 13, 1875, and acknowledged September 26 of the same year.

Plaintiff recalled Patrick Horan, whose evidence tended to prove: That he had made a mistake in his former testimony; and that it was in 1878 that he used the water out of the Boston Ditch. I piped and concentrated there altogether for three years, all but in the winter, when I could not use the ditch from snow and frost.

Plaintiff then offered the testimony of J. M. Gleaves, which tended to prove: That he is a competent and qualified surveyor and civil engineer. That he knew the Altoona and Trinity quicksilver mines of Trinity County, California. That he knew the Boston Ditch and the Altoona Ditch. That he had made a survey of them in August, 1895, and platted the result of the surveys. (Witness presented a map of the surveys, copy of which is herewith filed and marked Exhibit 1.) That this map correctly represented the result of his surveys.

[*Map Exhibit 1. See end of this Record.*]

Plaintiff next offered the testimony of W. B. Littlefield, which tended to prove: That he knew the Altoona Quicksilver Mines in Trinity County. That he first went to those mines in the fall of 1875 for the purpose of selling cattle. That he saw a ditch with water run-

ning in it near the mine. That he went there to live in January, 1876. There were working the Altoona Mine at that time. That he lived between the Altoona Mine and the Boston Mine. That there was a ditch below his house running out of Crow Creek to the Altoona Mine. That he kept a boarding-house and saloon That he lived there one season, and then moved his house down to the Altoona Mine, and remained there until 1879. That while he was there water was running in the Altoona Ditch the ditch was generally about two-thirds full. That he knew the Boston Ditch, coming from Wiltz Gulch directly above the Boston Mine, and also from Crow Creek to Wiltz Gulch. That this ditch was above the Altoona Ditch—up the mountain. That it was a pretty rough country—mountains and brush—pretty steep mountains. That he was frequently up Crow Creek. That he saw the water running in the Boston Ditch. That he knew of a reservoir that was built while he was there, two or three hundred yards above the Altoona Ditch, between the Boston Ditch and the Altoona Ditch. That the reservoir was below the Boston Ditch. From the reservoir the country slopes southeast towards the Altoona Mine. That the water for the reservoir came from the Boston Ditch, the upper ditch, and went from that reservoir into the lower, Altoona Ditch. That while witness was there the extension of the Boston Ditch from the Boston Mine to the reservoir was made. That while he was there another ditch was dug out of the reservoir leading around to the western slope of the hill, north of the Altoona Mine, quite a ways above the lower ditch. That that

ditch was built after the Boston Mine closed down. That from that part of the ditch, while witness was there, they used water at the Altoona Mine from both ditches and for different purposes, for concentrating ore and for hydraulicing, the same as in a gold mine. The hill was pretty steep from the Boston Ditch down to the mine—I think a slope of about 45 degrees—and the water ran through a pipe. I think it was a six-inch galvanized iron pipe, about four hundred feet long. It had a pressure of 140 or 150 feet. The water went onto the bank and washed everything into the flume. Of the three years that I was there, there was one winter that no water was running in the ditches for two or three months, on account of the deep snow. They first extended the Boston Ditch to the reservoir, and then dug another ditch from just below where it emptied out of the reservoir, and led it around onto the western slope of the hill, and used the water from that ditch for hydraulicing and concentrating the ore. The Altoona Ditch carried the water onto the southern slope of the divide, and from the Boston Ditch you could take it on to the north slope. When they had extended the Boston Ditch they took the water over on to that side of the divide. They used it on the Trinity claim and also on another claim. That a man by the name of Loring used it. I think he rented that water part of one season. I do not know how long. Maybe two seasons, I am not positive. He rented it from the Altoona Company. That he had a good hydraulic head, and the water came out of the Boston Ditch. They had a pipe line from the upper ditch, and the pipe line was about one hundred

yards from my house. They used the water up to about a month before I left. That he thinks they used the water from the upper ditch for two seasons while he was there on the Trinity claim and on the Loring claim. That the Altoona Company built the extension of the Boston ditch from the Boston Mine to the reservoir. That witness left there in December, 1879. That he was not positive, but did not think the Boston Ditch was used in the year 1879. He was foreman of the mine part of two years. That when he first went to that vicinity the Boston Mine was using the water from the Boston Ditch, for sluicing on the Boston Mine. He was pretty positive that the Boston Mine shut down in 1876. Mr. Butler might have mined some on the Boston after that while I was there. That while I was there Mr. Horan had charge of a gang of Chinamen working for the Altoona Company and piping on the Altoona claim side; that is on the southerly side. That witness was back in that locality the year before the trial of the suit. I went along both ditches at that time. The lower ditch was about the same size as when I was there, but wasn't in as good condition. There was water running in the ditch at that time, but it was not near full. They were putting up buildings and machinery at the Altoona Mine. Mr. Horan was with me. I saw the Boston Ditch from Wiltz Gulch down to where it empties into the reservoir for the Altoona Mine; the reservoir near where my house first stood. The Boston Ditch was in retty good condition except the lower part of it. That the lower part of the Boston Ditch, where it enters into the reservoir, was in bad condition—pretty well filled up.

I do not think that it would carry water if water was turned into it. There were some places where it had been washed out, and I think it would let the water out. That Boston Ditch is built on the side of a pretty steep mountain, about 45 degrees, but from the Boston Mine to the reservoir it is not quite so steep. There is timber all along the ditch. The side of the mountain is pretty rocky on the surface, broken rock laying loose over the surface. When there is a heavy snow and the snow goes off with the rain it washed the country up considerably, and sometimes there are slides that will tear a ditch all to pieces. When the ditch was about two-thirds full the water ran about half as fast as a man would walk, or a little faster. If it was full it would run as fast again. When I spoke of the Boston Ditch being somewhat filled up, the filling was with dirt from the upper bank of the ditch, and leaves and pine boughs and one thing and another. I think that the extension of the Boston Ditch from the Boston Mine to the reservoir was built in the summer or fall of 1876. I am not positive. I am pretty sure that the Altoona Company ran water in the Boston Ditch in 1876, and also that they ran water in it the next year, in 1877. That they used water from the Boston Ditch and reservoir for hydraulicing on the Trinity claim in 1876. That they used it probably for two seasons—1876 and 1877, and perhaps in 1878. They used it on the Trinity claim two or three years, and then they used it on the Loring claim afterwards. I rather think that there was no water in the reservoir in 1879. I was there once in 1885, and at that time crossed the ditch in the vicinity of the reservoir. I don't recollect

seeing any water in the ditch or reservoir at that time. I think I would remember it if there had been. That in 1895, when I was at the mine, there was not more than three or four miner's inches of water in the Boston Ditch; that water came from the Wiltz Gulch. The ditch from the Boston Mine up was in very fair condition. That the Boston Mine was closed down in 1876, and was not afterwards worked by the Boston Company. That the ditch from the reservoir was not completed until after they closed down the Boston Mine. That witness was there last year, and the Boston Ditch below the Boston Mine was in bad condition, pretty well filled up, and would not carry water.

The plaintiff next introduced the testimony of M. D. Butler, which tended to show: That the witness knew the Altoona Quicksilver Mining Company's properties, the Boston Mine, the Boston Ditch, and the Altoona Ditch. That he was the original claimant of the Boston Mine. That he thinks the Altoona Ditch was dug in 1875. That he commenced to build the Boston Ditch in 1875, together with his partner, Mr. C. Worland, for the purpose of conveying water to the Boston Mine to concentrate cinnabar ore. That the ditch was completed by the Boston Cinnabar Mining Company, which had previously been incorporated. Here plaintiff introduces in evidence the articles of incorporation of the Boston Cinnabar Mining Company, bearing date July 27, A. D. 1875; also the certificate of incorporation of the same company, dated July 30, 1875. That at the time when the Boston Ditch was commenced the witness and his partner were in posses-

sion of the Boston Mine. That they conveyed the Boston Mine to the Boston Cinnabar Mining Co., a corporation, August 3d, 1875, and thereupon delivered possession to the Boston Cinnabar Mining Company, and that after the deed was made the Boston Mine was in the possession of the Boston Cinnabar Mining Co. That thereafter the Boston Cinnabar Mining Co. constructed the greater part of the Boston Ditch and completed it. That there were two ditches, one coming out of Crow Creek from away up in the mountains, emptying into Wiltz Gulch, another lower down, nearly parallel to the Altoona Ditch, and further up the mountain, conveying the water from Wiltz Gulch and running it around to the Boston Mine. That the Boston Company took the ditch from the Boston Mine to perhaps a quarter of a mile of the Altoona and dropped it down into the reservoir which they dug on the flat, from which they ran a ditch above the Altoona Ditch, to bring the water onto the Trinity claim on the other side of the ridge. That this extension of the ditch was completed in 1876 or 1877. That the Boston Cinnabar Company used the water of the Boston Ditch for sluicing out cinnabar on the Boston Mine.

At this point counsel for plaintiff offered in evidence the deed dated August 16th, 1877, by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situated in Trinity County, State of California, commencing at the Crow Creek, and running thence to the Wiltz Ravine, and thence

to the mining property of the party of the first part, to wit, the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's Ditch, which deed was duly acknowledged August 16, 1877, and recorded in the county records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground that it was void, as it appeared that it was made after the grantor had ceased to use the water. The objection was overruled and deed admitted in evidence, to which ruling of the Court, defendant, by counsel then and there duly excepted.

Plaintiff further offered testimony by the same witness, M. D. Butler, tending to prove: That the Boston Mine was abandoned, and long after August, 1877, relocated by him. That witness was manager of the Altoona Mining Co. from May, 1889, to June, 1894, and superintendent there at the mines. That in 1885 or 1886 the witness used water from the Boston Ditch, to concentrate ore on the Boston Mine, after the relocation of that mine by him. That Mr. Charles Allenberg was the Secretary and Manager of the Altoona Quicksilver Mining Company.

At this point plaintiff identified by the witness the letter hereinbelow copied as one received by him shortly after it was written, and offered it in evidence. Counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent. Objection overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

The letter was then read in evidence as follows:

"Jan. 10th, 1889.

"MR. M. D. BUTLER, Cinnabar:

"*Dear Sir:* The Altoona Quicksilver Mining Com-
"pany hereby grants you permission to use the water
"out of the ditches belonging to the above-mentioned
"company this spring, and until such a time as the com-
"pany shall have use for the same, due notice of which
"you will receive from the undersigned. In considera-
"tion therefor, you agree to keep the ditches in good
"order and repair without any charge to this com-
"pany. Please give me in writing your concurrence
"thereto.

"Yours truly,

"CHARLES ALLENBERG,

"Secretary Altoona Quicksilver Mining Company."

Plaintiff next identified by the witness the letters hereinbelow copied as one written and mailed by him at the date thereof and received by Allenberg shortly after, and offered it in evidence. Counsel for defendant objected, on the ground that it is immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted.

The letter was then read in evidence, as follows:

"CINNABAR MINING DIST,,

"Trinity Co., Jany. 29, '89.

"CHAS. ALLENBERG, Esq.:

"*Dear Sir:* I am in receipt of yours of 22nd inst., en-
"closing permit to use water out of ditches belonging to

" Altoona Quicksilver Mining Company, and in consid-
" eration I agree to keep said ditches in good order and
" repair at my own expense, and keep possession of same
" for said company subject to your order.

" Yours truly,

" M. D. Butler."

Plaintiff further offered testimony by the same witness tending to prove: That after the date of said agreement made in 1889 witness sluiced for ore on the Loring claim for one season with water used from the Altoona Ditch. That no water came to the Altoona Ditch from the Boston Ditch at that time in 1889. That in 1890 the witness sluiced for the Altoona Company on the Trinity claim, using water from the Altoona Ditch. That the witness never saw any pipe line on the Boston Ditch or from the Boston Ditch down to the Trinity. I was not in camp during its use, if it was used there. I saw where it evidently had been used, but I was not there when it was in use. That in 1891 witness used the water of the Altoona Ditch for sluicing on the Trinity claim for the Altoona Company. We were taking the cinnabar out of the rich veins on the Altoona mines, and concentrating that ore by the use of this water through a tunnel and sluice boxes, catching the coarse cinnabar in the ravine and boxes, and the fine cinnabar on tables covered with Brussels carpet. We applied the water under hydraulic pressure—whatever pressure we could get. Early in the season we could not take all of the water. There would be more in the stream than the ditch would carry. Later

in the season we would take all that we could get. The Altoona Ditch was about eighteen inches wide on the bottom, twice that on the top, and eighteen inches to two feet deep. That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Co., and was their general manager and superintendent up there. That the work done on the Loring claim was done with water from the Altoona Ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Question by Plaintiff. Do you know how much ore had been taken out of that mine up to the time that you left?

Objected to by defendant as immaterial, irrevelant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. About 12,000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76½ pounds.

Question by Plaintiff. Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled by the Court; to which ruling defendant, by its counsel, duly excepted.

Answer. At one time $115.00 a flask, and from that down to $45.00.

Witness stated he had often been in the Altoona Mine and Tunnel.

Question by Plaintiff. State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. It does for nearly 600 feet.

Question by Plaintiff. How wide is that ore body?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled; to which ruling of the Court defendant duly excepted.

Answer. It varies from 4 feet to 22½; that was apparent in the bottom of the tunnel, right through there, and all of the work had been done above the level of the tunnel.

Witness further gave evidence tending to prove: That the witness sluiced on the Boston Mine in 1886 and 1887 with water from the Boston Ditch. I relocated the Boston Mine, September 10, 1885, and it was after that that I used the water.

Question by Plaintiff. Did you have any controversy with the superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted.

Answer. I did; with Louis Girard (who was the representative of the Altoona Quicksilver Mining Company of the ground), about the use of the ditch and water.

Question by Plaintiff. What did he say to you about it?

Same objection, ruling, and exception.

Answer. He came on the ditch and told me I must stop using the water of the ditch; that it was the property of the Altoona Company.

The witness further gave evidence tending to prove: That the witness first went to Cinnabar Mining District in 1873 or 1874. That there were no fences or enclosures anywhere in the district at that time. That so far as appearances went, no land had been taken up except for mining purposes. That the district is about 4500 feet above the level of the ocean. That there were no inhabitants in the country except prospectors. That in the year 1886 witness concentrated ore on the Boston mine with water from the Boston Ditch. That they took all the water the ditch would carry. The water came from Wiltz Gulch and Crow Creek. That they commenced about March 12th and continued as long as the water lasted—perhaps about three months. That in 1887 he did the same; in 1888 the same. That he used the water a short time in the year 1889, until in April, on the Boston Mine. That in 1889 the witness had possession of the Altoona Ditch by consent of Mr. Allenberg, secretary of the plaintiff. That he used the water from the Altoona Ditch on the Altoona claim concentrating the ore. That in 1890 witness used water from the Altoona Ditch on the Altoona Claim; also in 1891 and 1892, concentrating ore. That in 1892 water was turned into the Boston Ditch, above the Altoona Ditch, by Professor McCaw or his employee. That McCaw was at that time president of the corporation defendant. That water was turned into the Boston

Ditch by the McCaws, and a notice posted by the Integral Mining Co. claiming the water. That the McCaws cleaned the ditch and took the water to the Integral Mine, and used it at their furnace and at the cook-house at the Boston Mine. The corporation was the Integral, but the mine always went by the name of the Boston. The Integral Company took possession of the Boston Mine some time in 1891 or 1892. The taking of the water in the Boston Ditch reduced the flow of the water in the Altoona Ditch. It lessened the flow materially. That the taking of the water through the Boston Ditch that year did not interfere with the Altoona Co., having all the water it needed through the Altoona Ditch. That the defendant took possession of the Boston Mine some time in 1891 or 1892. That witness turned the water out of the Boston Ditch so that it would go down to the head of the Altoona Ditch, for the purpose of keeping the water running continuously at the Altoona Mine, on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right, and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona Mine. That two days after the witness turned the water out of the Boston Ditch the McCaws turned it back into the Boston Ditch again. That they continued to use it afterwards that season at the Boston Mine.

Question by Plaintiff: What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any

officer of the Integral Company with regard to the use of this water, if any?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the water; and warned me that if I continued that interference his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court; to which ruling of the Court the defendant, by its counsel, duly excepted.

The witness further gave evidence tending to prove: That the witness in turning the water off was acting as agent for the Altoona Co. That prior to January, 1889, when witness was using water out of the Boston Ditch, Girard, superintendent of the Altoona Co., came up and turned it off, and notified him that it was property of the Altoona Co., and that witness could use it only by permit. That the witness made some sort of a compromise with Girard by which the Altoona Company, which Mr. Girard was representing, would allow us to use the water, and continued to use the water. That during the years 1886 and 1887 and 1888 he was frequently in San Francisco, and saw Mr. Allenberg at his office, and conversed with him about the ditches, but could not repeat the conversation. That the Boston Co. completed the Boston Ditch to the Boston Mine only. That the Boston Mine lies just above the present furnaces of the defendant. That the Boston

Ditch was constructed from the Boston Mine by the Altoona Quicksilver Mining Co., first to a reservoir and thence to a point above the Altoona and Trinity mines. That he made a mistake when he testified that the Boston Company constructed any portion of the ditch below the Boston Mine. That the Boston Company constructed the ditch only down to the Boston Mine, to the vicinity of the present works of the Integral Company; that from there on the ditch was constructed by Mr. Lawrence, representing the Altoona Quicksilver Mining Company, first to a reservoir, and then continued around to the Altoona and Trinity mines, and dropped down on to the Trinity claim, owned by the Altoona Quicksilver Mining Company, and the claim below.

In 1886 or 1887 the witness used the water from the Boston Ditch also on the Dolliffe mines, which has also been called the Ruby and El Madre, his son, Mr. Tichenor, and Mr. Robertson, and himself having gotten permission from Mr. Allenbery to use the Altoona Ditch, and take the water for that purpose. We worked one year, as long as the water continued sufficient to mine with. We were mining by the hydraulic method. That the witness never saw the water running in the extension of the ditch. That in 1888 or 1889 witness used water from the Altoona Ditch on what was known as the Loring or Ruby claim. Witness having been shown a letter, and identified the same as in his handwriting, and having stated that he wrote the letter at about the time the letter bore date, says: That it was about the 1st of August, 1889, when witness ceased to use the water of the Boston Ditch on the Boston Mine. That it was

about August 9th, 1892, that witness turned the water out of the Boston Ditch. Witness, at the time he turned the water out, posted notices that the Altoona Company claimed the ditch and water right, which notices very shortly afterwards disappeared. That witness turned the water out of the Boston Ditch the second time about August 17, 1892, because he wanted to keep the water running in the Altoona Ditch; because if I discontinued the water I never could get it around again until rains came.

On cross-examination of the witness, defendant elicited evidence tending to prove: I think that the Boston Mine was abandoned by the Boston Co. in 1876. I was back there a number of subsequent years. I do not remember whether I was there in 1877 or 1878. I am sure I was back there in 1882. That prior to its abandonment, it was probably worked for about three years. That in about 1882 the witness relocated the Boston Claim. That the water from the ditches would usually flow until in August or September. That it would fail in the upper, or Boston, ditch before it would fail in the Altoona Ditch. That from 1882 to 1892, witness was familiar with that portion of the Boston Ditch extending from the Boston Mine to the reservoir. That during that period no water flowed through the ditch from the Boston Mine to the reservoir, to his knowledge. He could not say positively that it was in 1876 that the Boston Mine was abandoned. That witness conveyed the Boston Mine to the McCaws, from whom the Integral Company derives title. That from the time he relocated the Boston Mine, he

was there continuously until he made the conveyance, which must have been three or four years. That the Boston Mine was not worked from 1876 to 1882, to his knowledge. That from the time of the relocation by witness of the Boston Mine no one ever interfered with his possession of it. That after he relocated the Boston Mine he was there continually until he conveyed it to McCaw. That in 1889 witness moved over to the Altoona Mine as manager for plaintiff. That in 1892 the Boston Ditch between the Boston Mine and the Altoona reservoir was filled up with gravel, sand, rocks and trees, more or less, and was not in a condition to run water. That it was not in condition to run water in 1882, when witness relocated the Boston Mine, nor was that portion of the ditch between the Boston Mine and the reservoir in condition to conduct water in any year between 1882 and 1892. That in 1882, when witness relocated the Boston Mine, the Boston Ditch from Wiltz Gulch to the Boston Mine was in a similar condition to the other part of it; it had to be cleaned out to run water through it. That from 1882 to 1886 no water ran through the Boston Ditch except that used by witness on the Boston Mine. That witness used the water in hydraulicing in 1886, 1887, 1888, and a portion of 1889. That he did not use any water between 1882 and 1886. That the portion of the ditch that extended from Crow Creek to Wiltz Gulch was commenced by witness in 1875 and it was finished the next season. That about 100 or 150 yards from where that ditch heads out of Crow Creek it runs around the brow of a hill; it was carried through a flume; from 1882 to 1886 there was no flume there—

it was broken down. That in 1886 witness repaired the flume. That the flume was made of three planks, twelve inches wide. That the witness turned the water out of the Boston Ditch in 1892, because he was instructed to turn it out, not because they had any use for the water at the Altoona Mine at that particular time. That in 1886, when witness cleaned out and repaired the Boston Ditch, it had not been used for a great many years. That since 1889 there has been a change in the method of working ore in the Cinnabar District. That since then they have adopted furnaces. That the witness never used any water on the Trinity claim or the Altoona claim from the Boston Ditch. That the defendant used the water of the Boston Ditch at its furnaces. That it requires only a few inches of water for that purpose. That when witness started in to use the water of the Boston Ditch, and Mr. Girard objected to it, no one else was using the water. That when Mr. McCaw started in to use the water, and witness turned it off, no one else was using the water from the Boston Ditch. I am not sure whether it was in 1882 or 1883 that I went back there. That from 1886 to 1892 the Altoona Company had made no use of the water through the Boston Ditch for their own benefit. They worked the Altoona Mines by the hydraulic process until I left there, and I have not been there since. That a map produced by the defendant of the Cinnaber Mining District, Township 38 North, Range 6 West, Mount Diablo meridian, Trinity County, is, in the opinion of the witness, reasonably correct. The witness pointed out on the map the location of Crow Creek, the Boston Ditch, the reser-

voir, and stated that the location of the Boston Ditch below the reservoir on the map was incorrect. Witness examined the mining claims as laid down on the map, and stated that they were laid down about right. He thought they were quite correct as laid down. That the map presented a very good outline of the country.

(Copy of said map is herewith filed, marked Exhibit 2.)

[*Map Exhibit "2." See end of this Record.*]

Witness, on cross-examination, gave further evidence tending to prove: That there never was any place where the waters of the Boston Ditch, after leaving the Boston Mine, ran down into the Altoona Ditch. That witness was on the Boston Ditch between 1889 and 1892, and it was then in very good condition; in reasonably good condition.

I did not see them use the water from the Boston Ditch on the Loring Claim, but when I went back there in 1883 I could see that they had been using the water from the Boston Ditch on the Loring Claim. They could not have done the work on the Loring Claim which had been done unless they used the water from both ditches. I only know that they used the water on the Loring Claim from the Boston Ditch from the appearances. That before the witness started in to use the water on the Boston Mine when he said Mr. Girard registered an objection, no one else was using the water through the Boston Ditch. The water was being used through the Boston Ditch on the Boston Mine up to 1876 or 1877. When I attempted to use

the water in 1886, I was stopped by Mr. Girard, who said the Altoona people claimed the water. I then obtained from them a right to use first the Boston Ditch and afterwards, in 1889, the right to use both ditches. I then used the water from the Boston Ditch in 1886, 1887, 1888, and 1889. In 1892, when McCaw put up his notice and started in to use the water, I, acting for the Altoona Company, put up a protest. When I went there in '86 they were using the water through the Altoona Ditch. They worked two or three seasons concentrating, and they were running water through the Altoona Ditch all the time, to the best of my remembrance. In hydraulicing we used a pipe with an elevated reservoir, so that it gives force to the water to cut away the bank. In sluicing we run the water over the ground and pick our ground out that we wish to convey away by the force of the water. In working the Altoona Claims we hydrauliced them all. I am not aware that they hydrauliced any more. In using a furnace they do not hydraulic or ground sluice. How much water would be required to run the furnaces depends upon whether they hoist with water or with steam, and I don't know how much water is required on the furnaces themselves. We had not got to using the water to hoist with when I lelt the mine. There is sufficient water there for water power for hoisting works certain seasons of the year. By piping the water it might be sufficient for that purpose all the year around. Defendant's counsel shows the witness a letter dated August 9, 1882, and reads from it as follows, said letter being written by the witness to Mr. Allenberg: "This

A. M. turned all of the water out of the Boston Ditch and posted notices. McCaw is not here. Go to concentrating on Thursday morning, and must have all the water." And witness states that as far as he knows that letter was all true. Any water which they take in the Boston Ditch during low stages interferes with the water of the Altoona Ditch.

On redirect examination plaintiff elicited testimony from witness tending to prove: That it was in 1883 that he relocated the Boston Mine, instead of 1882, and that it was about the last of July, 1883, when he returned to the Cinnabar District (instead of 1882), after leaving there in 1877, and between those years he was only in there once, and that that would affect his testimony about the water not running in the Boston Ditch in 1882, for he didn't know anything about it until he returned there. It would also change the witness' testimony with regard to his having been at the Boston Mine continuously from 1882; that after he relocated the Boston Mine he was away from there at different times two months or a month at a time, attending to his mining interests at French Gulch; also that the date when the Boston Mine was abandoned was 1877 instead of 1876. Witness makes this correction after being shown the deed from himself and Worland and wife to the Boston Cinnabar Mining Company, dated August 7, 1875, and testifies that the Boston Mine was worked two summer seasons after that deed was made.

By witness F. H. Loring, plaintiff elicited facts tending to prove: That he first knew the Cinnabar Mining District in Trinity County in 1873. That he knew the

Altoona and Trinity quicksilver mining claims; they were called the Altoona Mine. That he knew the Altoona quicksilver mining property from 1873 to 1885. That in 1881 there were two ditches in the vicinity of the Altoona Mine, the upper and the lower ditch; the upper ditch covered the ground on each side of the divide; the lower ditch covered the ground on the Altoona side only. That by the divide the witness meant the divide between the North Fork and the East Fork of Trinity and Crow Creek. That it came on top of the divide between the mine that the witness owned and the Altoona Mine. That the mine the witness owned he called the Davis Mine. That prior to 1881 he had seen water used by the Altoona Company from both ditches in sluicing the ground below the divide. That witness used the water from the upper ditch in working the Davis Mine in 1881, 1882, 1883, and 1884. That H. C. Osgood and Morris Osgood, his son, attended to the ditch at that time. That there were no ditches in the vicinity except the two ditches the witness mentioned. That the witness got the water from the upper ditch on his claim, and it was arranged to come over the divide and to be turned out by means of a box on either side of the hill. That part of the water ran around the hill to the ditch, and thence into a ground sluice, and part of it was run in a pipe; the pipe was about 200 feet long. That in 1881 the witness mined as long as the water lasted. That year the Altoona Company had a lease of my ground and used the water from the upper ditch sluicing out the cinnabar. That at that time he could not get the water from the lower ditch over to his claim. That the next year

he mined the same way about the same time, and also the next year after that. That in 1881, 1882, and 1883, he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness, having first proved the genuineness of the signatures of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was president of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence, on the ground that the same was irrelevant, immaterial, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Said agreement reads as follows, to wit:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part.

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine of "said first party, and may use the iron pipe of said sec- "ond party for the purpose of conducting said water to "the mine of said first party, and in consideration thereof "the said party of the first part agrees to give and pay "to the said party of the second part one-third of the "net proceeds of the mine of said party of the first part

" so worked by him. The party of the second part is to " incur no liability or expense whatever in case there " shall be no proceeds from working said mine; and the " party of the first part is not to pay to the party of the " second part any compensation whatever for the use of " said water and pipe, unless and until after all the ex- " penses of working said mine shall have been paid out " of the proceeds thereof. This agreement is not to " continue after the expiration of the year 1882.

" In witness whereof, the party of the first part and " of the second part have executed this instrument the " 31st day of May, 1882.

" F. H. Loring,
" Davis Cinnabar Mine.
" E. L. Goldstein,
" President Altoona Q. Mg. Co."

(Marked " Plaintiff's Exhibit S.")

Plaintiff also had identified and proved the genuineness of the signatures, and that at the date of the instrument said E. L. Goldstein was president of the Altoona Quicksilver Mining Company, and offered in evidence a certain agreement, and defendant by its counsel objected to the introduction in evidence of said agreement on the ground that the same was irrelevant, immaterial, and incompetent. The objection was overruled by the Court, to which ruling of the Court the defendant by its counsel then and there duly excepted.

The said agreement reads as follows:

" This Agreement, made and entered into between " F. H. Loring, party of the first part, and the Altoona

"Quicksilver Mining Company, a corporation, party "of the second part,

"Witnesseth: That the said party of the second "part agrees that the party of the first part may "have whatever water belonging to said party of the "second part is requisite for the working of the quick- "silver mine of said first party, and may use the iron "pipe of said second party for the purpose of conduct- "ing said water to the mine of said first party, and "in consideration thereof, the said party of the first "part agrees to give and pay to the said party of "the second part one-third of the net proceeds of the "mine of said party of the first part so worked by him.

"The party of the second part is to incur no lia- "bility or expense whatever in case there shall be no "proceeds from working said mine, and the party of the "first part is not to pay to the party of the second part "any compensation whatever for the use of said water "and pipe, unless, and until after, all the expenses of "working said mine shall have been paid out of the pro- "ceeds thereof.

"This agreement is not to continue after the expi- "ration of the year 1883.

"In witness whereof, the party of the first and of the "second part have executed this instrument, this sixth "day of March, 1883.

"E. L. Goldstein,

"President Altoona Quicksilver Mg. Co.

"F. H. Loring,

"Davis Quicksilver Mine."

(Marked "Plaintiff's Exhibit T.")

The proceeds of the mining operations of the year 1881, were divided between myself and the Altoona Quicksilver Mining Company; I received one-third for furnishing the ground, and the company two-thirds for furnishing the water and labor.

On cross-examination of said witness Loring, defendant elicited evidence tending to prove: That he had never been on either the Boston or the Altoona Ditch, except in crossing them. That on his direct examination witness was mistaken in the names of the ditches. That he got water from both ditches; that, as he now remembers, the Altoona Ditch was lower down the divide than he supposed. That when he said he was mistaken, he meant that he thought the Altoona Ditch proper was lower down the hill on the divide than he found it was. That he supposed the Altoona Ditch was below the summit of the divide; whereas, in fact, it was on the summit of the divide, and the Boston Ditch still above it. That he never took any water directly from the Boston Ditch. That he got all of his water from the Altoona Ditch. The water that I got in 1882 and 1883 came through the Boston Ditch into the Altoona Ditch. That he never saw any water running from the Boston Ditch into the Altoona Ditch. The way I know that I got water through the Boston Ditch into the Altoona Ditch is, I had a man in charge of my water and paid him for repairing those ditches, and that he was testifying from his general knowledge at the time of the situation in regard to the water, but not from his own knowledge of seeing the water. That if he ever used any of the water of the Boston Ditch it was water which first ran from

the Boston Ditch into the Altoona Ditch, and taken by the Altoona Ditch on to his mine. That the witness remembered an extension of the Altoona Ditch being made through a cut over the divide, so that the water of the Altoona Ditch could be run onto his mine. That the water of the Altoona Ditch would readily flow onto his mine. The Altoona Company worked the ground in 1884, and that witness remembers seeing the water running onto the mine in that year when he visited the mine. The water was running by the usual way in which they always conduct the water, through the Altoona Ditch. That the witness was never along the Boston Ditch in all his life, and never saw any water running in it. That his mine, the Davis Mine, was a claim 600 feet wide and extending north and south a distance of 1500 feet. His location run lengthwise, with the Altoona joining it at the corner of the Altoona and Trinity, and was a portion of the claim marked on the map of the defendant hereto attached, marked "Exhibit 2," as the Ruby claim, and a portion of what is called on said map the Garnet claim. That in the seasons of 1881, 1882, and 1883, they commenced to mine in the spring as soon as the snow allowed the water to run, and continued to mine until the last of July; that they allowed the water to run later to keep the boxes wet up and from falling to pieces; that in the year 1881 he visited the property on an average once a month and would stay one or two days at a time, and it was about the same during the other years.

On redirect examination of said witness, plaintiff elicited evidence tending to prove: That before the Altoona

Ditch was extended, witness' claim was on the opposite side of the divide. That the extension of the Altoona Ditch to carry water to his mine had to cross the divide and run around the side of the hill onto his ground. That before the extension of the Altoona Ditch the witness never noticed any particular change in the divide except in grading in mining operations and running a wagon road across there. That there was sluicing done at or near the summit of the divide. That it was after the sluicing that the Altoona Ditch was extended around and across the divide. That the witness had seen a watercourse coming into the Altoona Ditch on the north side of the Altoona Ditch about 200 yards from the end of the ditch, as the Altoona Ditch was before it was extended. That it was in appearance such as the water would make running from one ditch to another. That it appeared to be more natural than artificial. That it ran quartering down the hill from the direction of the Boston Ditch to the Altoona Ditch. That he had seen ten or fifteen yards of that watercourse. It was worn and had the appearance of any watercourse worn down by water running. That he never saw it at any point where it connected with the Boston Ditch. That the extension of the Altoona Ditch over the divide was made early in the spring of 1881. That he had seen the ditch above his mine. That he never saw a bulkhead there.

Plaintiff, on examination of J. S. Cox, witness, elicited evidence tending to prove: That the witness was a mining superintendent, and lately resided at the Altoona Mine, and knew the Boston and Altoona ditches. That he was the superintendent of the Altoona Quicksilver

Mine about fifteen months, from May, 1894, to September 8th, 1895. That there was no enlargement made of the Altoona Ditch while he was there, and no enlargement of the Boston Ditch by the Altoona Company.

The defendant, on cross-examination of said witness, elicited evidence tending to prove: That while he was superintendent, he put some boxes in the Altoona Ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona Ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water that ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On re-direct examination of said witness, plaintiff elicited evidence tending to prove, that the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes and to the condensers for the purpose of condensation. That the boxes were put in the immediate center of the ditch at the extreme lower end of the ditch immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question :

"What other uses could be made of that water at the Altoona Mines by the Altoona Company?"

Question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. Objection over-

ruled by the Court; to which ruling of the Court counsel for defendant then and there duly excepted. To this question the witness answered: "It can be put to pumping, hoisting, producing electric power and so forth."

Counsel for plaintiff then asked the following question of said witness:

"State whether or not all those purposes are necessary and useful in the working of the mine?"

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court; to which ruling of the Court counsel for defendant then and there duly excepted. To this question the witness answered as follows: "They are both necessary and useful."

On examination of witness E. F. Dack, plaintiff elicited testimony tending to prove: That he knew the Altoona and Trinity Quicksilver Mines, the Boston Ditch, and the Altoona Ditch. That he first became acquainted with them in 1883. That he saw water in the Boston Ditch the first and only time in 1889. That Mr. Butler was using it on the Boston claim hydraulicing. That the witness crossed the head of the Boston Ditch in 1886, in August. That no water was then running in the ditch. In '87, '88, and '89 witness was spending his time on Soda Creek, below the Altoona Mine, and saw the water in the Altoona Ditch, each of those years, running to the Altoona ground. I tried to use the water from the Altoona Ditch and Mr. Butler, the superintendent of the Altoona Company, took the water away from me and told me it belonged to the Altoona Company. Afterwards I got permission from Mr. Rostetter

to use it, and I cleaned out the ditch for the purpose. Mr. Butler and Mr. Rostetter each claimed to be in charge, representing the Altoona Company, but Mr. Butler would not let me use it. In 1888 Mr. Butler and some other men hydrauliced with the Altoona Company water over on the Trinity side. The same year Mr. Lytle used the water, making brick for the Altoona Company. In 1885 I was at the Boston Mine and saw Mr. Butler piping there. I know of his piping there that year two months. In 1891 Mr. Butler was using the water on the Altoona Mines, and I used the water below the place where he used it.

On cross-examination of said witness defendant elicited testimony tending to prove that witness was not in that vicinity from 1883 to 1886; that he went there again in 1886. That he went to the Cinnabar Mining District in the fall of 1887, all of 1888, 1889, and 1891. That he was tolerably familiar with the outline of the Boston Ditch. That he knows where the extension of the ditch was from the Boston Mine to the reservoir. That he never saw water flowing in that part of the ditch. He was not on the Boston Ditch at all in 1886, and in 1888 he was only on that portion of the Boston Ditch below the Boston Mine.

Plaintiff, on examination of the witness Morris Osgood, elicited testimony tending to prove: That he knew the Altoona Quicksilver Mining Company's properties in Cinnabar District. That he first knew them in 1879. That he was then in the employ of that company hydraulicing and concentrating the ore at the Altoona mine on the east side of the divide, that is, the side

towards Crow Creek. That he used the water through a hydraulic pipe about seven inches in diameter. That the fall from the ditch to where he was washing was about sixty feet. That he worked there four seasons. That the first season he cleaned out the lower ditch and worked on the upper ditch too. That he cleaned the upper ditch out. That they built a reservoir there in 1879. (Witness points out on plaintiff's map the place where he thought the reservoir was and marks the place with a cross and his initials.) Other men worked besides me for the Altoona Company in building the reservoir. That after they got the reservoir built they went to work on the other side of the hill, the side that the Loring Claim was on. That he helped to extend the upper ditch about 200 yards out onto a point and run it from the point down the hill, and then took the water into a hydraulic pipe, about northwest from the present hoisting works of the plaintiff; that point would be northeast from the Loring claim; right about the saddleback. That that year witness used the water, washing the surface off, piping; that is, in the year 1879 I helped to extend the ditch from the reservoir to that point. That they got the water from the Boston Ditch through the ditch and through a pipe. That they had a ditch down hill--down the ridge. That they built a bulkhead in there. That the water ran into the bulkhead, and then into the pipe and down to the claim. That the pipe did not run clear up to the ditch; it was a hundred yards from where the ditch dumped down. The water ran from that upper ditch down to that point until it came to the pipe line. That they had about 400 feet of pipe line, seven-inch

pipe. That witness worked there in the year 1880. That he worked at piping on the Loring Claim. That he was working for the Altoona Company. That he got the water out of the Boston Ditch, the same way as in 1879. That the witness was there in 1881, working for the Altoona Company, using the water on the same side. That they used some of the water out of the lower ditch, and used water out of the upper ditch. That they used water out of the upper ditch till it got pretty low, and then used water out of the lower ditch as an overflow to help carry away the waste material. That the witness did not work there in 1882. That he worked there in 1883 for Fred Loring. That he used water on the same side from the Boston Ditch. In 1879 and 1880 there were about twenty of us working for the Altoona Company; in 1881 there were not so many; and in 1883 there was himself and father and two Chinamen. That he attended to the Boston Ditch all the time he was there in 1879, 1880, 1881, and 1883. That he was looking after the water. That when the water would slack off he would go and turn some into the ditch, and keep the rocks out of the ditch. That he was working on the claim and attending to the water, both. That he was the only one attending to the ditch. That along about August or September, the water would slack off, and then they had to use the reservoir. During the years I was there, when we used the water from the Boston Ditch for mining, we used the water of the Altoona Ditch for an overflow. That they would shut the reservoir down and catch the water during the night. That during the night it would fill up, and that

would furnish water the next day. When I tended the Altoona Ditch, it was about three feet wide on top, two feet on the bottom, and the water usually ran about a foot deep. I saw the Altoona Ditch about two years ago, and it was then about the same size as when I tended it. When I went there we had trouble in getting the water through the Boston Ditch, so we built a reservoir on Wiltz Gulch, and sluiced mud down into the Boston Ditch, and the sediments would stop in the rocks. The ditch was dug through loose ground, and the sediment would fill the holes up in the bottom of the ditch.

On cross-examination of said witness, counsel for defendant elicited testimony tending to prove: That he was thirty years old on the 12th of May, 1895, and he was fourteen years old in 1879. That he ran a hydraulic pipe when he was fourteen years old. That the Boston Ditch was not constructed from the Boston Mine clear to the reservoir; it ran into a gulch, and the water was turned in the gulch, and ran down the gulch into the reservoir. That the reservoir was built in the same gulch that the water was dumped off into. That from the reservoir there was another ditch dug around the side of the hill. That it went from there to the Fred Loring and Altoona properties. That he helped to dig some of that ditch in 1880, about a hundred yards of it. That there was not any in it dug in 1881. That he did not use that ditch in 1879. Witness testified he made a mistake there; that it was 1879 when they extended that ditch around, instead of 1880; that they had to extend that ditch to get the water around to where they were working, and that he did

use it in 1879. That it was 1879, instead of 1880, when they extended the ditch. That the Altoona Ditch was dug over the divide, right through the gap. That they used the water from the Altoona Ditch on the Loring Claim. That he did not know of any connecting ditch between the Boston Ditch and the Altoona Ditch. That he did not know of any place between the Boston Mine and the end of the Boston Ditch, where water ran from the Boston Ditch into the Altoona Ditch. It had been so long ago he might have forgotten; that he may have seen it and forgotten it; that he did not remember seeing it. That he did not work for Mr. Fred Loring in 1882, nor in 1881, nor in 1880, nor in 1879. The Altoona Company paid him for his work. He did not know whether in 1881 the work was being done on the Loring claim or the Altoona claims; that he was sure that he last worked there for the Altoona Company in 1883; that the Boston Ditch heads in Crow Creek, runs to Wiltz Gulch, and dumps off into the Wiltz Gulch, and then runs from Wiltz Gulch with the ditch taken out of that, that ran around to another gulch below the Boston Mine, and dumped off from that into a gulch and into a reservoir. That the witness did not know where he was in 1885, 1886, 1887, 1888, or 1889. I was working part of the time in Siskiyou County, and part of the time in Trinity County. I was one place and another—some of the time at Dunsmuir, and sometimes at Weaverville. That if he sat down and figured them up he could tell where he was working.

The witness J. M. Gleaves was recalled for plaintiff,

and from him plaintiff elicited testimony tending to sho w

That the Altoona Ditch was about three miles and a quarter in length. That the Boston Ditch, from the place where it is taken from Crow Creek, runs about a half a mile to the top of the hill, and is there run down a channel made by the water into a gulch called Wiltz Ravine, and runs down that natural channel for about half a mile, and is then taken up and follows along to the point marked "20" on the plaintiff's map. (Exhibit 1.) That there it is thrown into a natural channel or ravine, and flows down that into a reservoir. That it is taken again around to the point marked "10," and drops again about thirty feet through a natural channel to the main ditch. The artificial portion of the Boston Ditch is about two and three-quarters miles in length. That in the Altoona Ditch there is a fall of about 56 feet between its head and its mouth. That in the Boston Ditch there is a fall of about 500 feet. That about 400 feet of that fall is in Wiltz Gulch. That the artificial ditch has a fall of about one-tenth of a foot to the rod. That he measured the capacity of those ditches to carry water. The capacity of the Boston Ditch is 618 miners' inches, measured under a four-inch pressure. The Altoona Ditch, run to its full capacity, is about 1,000 miners' inches.

Counsel for plaintiff at this point asked the witness the following question:

"State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston Ditch) above the collar of

the shaft in the hoisting works of the Altoona Mine?'

This question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. The objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted. The witness answered as follows:

" I took the elevation between the collar of the shaft and the mouth of the Altoona Ditch and found about 43 feet difference in elevation."

That between the collar of the shaft and the Boston Ditch on the point of the little hill above the mine the difference was a fraction less than 162 feet; that the collar of the shaft is the main level of the floor in the hoisting works; that the shaft is used for hoisting ores, and for general working purposes of the mine, and for pumping.

All this testimony was given under the objection of defendant as being incompetent, irrelevant, and immaterial, and was admitted by the Court, subject to the exception of the counsel for the defendant to the ruling of the Court.

Also the following testimony was given under the same objection, ruling, and exception.

That there is a cage used for hoisting ore, and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the

collar of the shaft and cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked a good miner would go down and sink the shaft deeper.

On cross-examination of said witness, the defendant elicited testimony tending to prove:

That the Boston Ditch from the Boston Mine down to the Altoona is in bad condition. That apparently it has been unused for several years.

That in surveying the ditch the witness noticed only one place where it was in condition that water would not run through it, and that was where the road crosses it. It had been filled in there with the road.

Witness F. H. Loring was recalled, and from him plaintiff elicited testimony tending to prove that since last on the stand witness had been talking with counsel for the plaintiff, and Mr. Allenberg, secretary for the plaintiff, and that as a result of that conversation it came distinctly to the memory of the witness that at one time in particular, taking a walk up the road leading from the Rossiter House to the divide, the first year the Altoona Co. worked the witness' ground, he passed the pipe and water running from the Boston Ditch into it. That the first year the pipe lay on the south slope of the north hillside of the gulch above Rossiter's House, running north towards the Boston Ditch. That it was a line of black heavy pipe 200 or 250 feet long. That he remem-

bers seeing it running into the bulkhead. That that was in the year 1881.

Louis N. Girard, was called as a witness for plaintiff, and from him plaintiff elicited testimony tending to prove: That he knew the Altoona Quicksilver Mining Co's properties. That he first went there in 1879, late in December, and remained in the Cinnabar Mining District off and on until a year ago. That he remained at the Altoona Mine off and on until 1888, in the fall. That he was in the employ of the Altoona Company and Mr. Lytle and Mr. Loring, from 1880 to 1888, and also worked for Mr. Loring. That in the year 1884, witness was the manager or superintendent of the mines of the plaintiff in Cinnabar District. That in 1884, witness used water for mining purposes on the Altoona Mine through a hydraulic pipe, which came from the Altoona Ditch, and did sluicing also on the Trinity Claim of the Altoona Mine from March 2nd, until the last of July. That, in 1884, the witness and another man cleaned the Boston Ditch the full length. That it was in September, 1884, about the 10th, that he commenced it, and the work was completed about the last of September. That he had a man twelve or thirteen days helping him, besides working himself. That in 1885, he was still manager for plaintiff. That he mined and used water that year the same as in 1884, and from the Altoona Ditch. That March 14, 1885, he wrote to Mr. Allenberg: "I will have the pipe running in three days. Water will not last long unless we get a wet spring. The snow all gone. Cannot work from the upper ditch;" no water, so I will do the best I can from the lower ditch. That he

mined that year and used the water until June 12th. I think the water lasted about three months. That he had no use for the Boston Ditch in 1885. That he had no intention of using the water of the upper ditch that season. That in 1886, he had charge of the Altoona mining properties. That he kept the Altoona Ditch in repair that season. That in the year 1887, he was still in the same position, taking care of the properties of the Altoona Company. During the examination of this witness, counsel for defendant objected to certain evidence on the ground that it was immaterial.

Counsel for plaintiff stated: They have denied that we owned, or ever owned, either the Altoona Ditch or water right, and denied that we had any right to divert any water through the Altoona Ditch. That is in the pleadings.

The Court. That is not in the statement of counsel. Mr. Campbell's statement before the Court and jury was clear, and I think he made no controversy about the Altoona Ditch.

Mr. Campbell (of counsel for defendant). I do not make any contention over their right to the Altoona Ditch. I simply say we do not deprive them of the water which they are entitled to have run down it.

Mr. Cross (of counsel for plaintiff). I suppose we try the case on the issues made in the answer.

The Court. Oh, no. That is entirely a fallacy. Counsel can get up and abandon his answer. When he does, the case is tried on his admission.

At this stage, counsel for plaintiff asked of the witness the following question:

"During the year 1886, did you make any arrangement for the company with the Butlers in regard to the use of the water of the Boston Ditch?"

This question was objected to by counsel for defendant as irrelevant, immaterial, and incompetent; which objection was overruled by the Court; to which ruling of the Court the defendant by its counsel then and there duly excepted.

The witness answered to this question: "I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative."

Witness further continuing, plaintiff elicited evidence from him tending to prove: That no mining whatever was done on the Altoona in 1887; but he kept the Altoona Ditch in repair and took care of the Altoona property. That the witness was there in 1888 as representative of the Altoona Company. During that year, as representative of the Altoona Company, he rented the water from the Altoona Ditch to a Mr. Tisher for $5.00 a month, who used the water mining that year, sluicing and hydraulicing on the west side of the Altoona Mine, on the El Madre Claim, which was the same ground as the Davis Claim, and that Mr. Robinson and the two Butlers worked with Tisher on those mining operations. That the water used by them ran through the Altoona Ditch. That witness ceased to be in the employ of

plaintiff about July or August, 1888. That while the witness was agent and manager of the plaintiff, he was employed to take care of the Altoona Mine and the Trinity Mine and the Altoona Ditch. That as to the Boston Ditch he had no instructions. That when he had the men working on the Boston Ditch, he did so because he supposed it belonged to the company, and because they had used it in 1880, and he was under the impression that the Altoona Company owned the ditch. That he knew that it was his business to look after all the property which the Altoona Company owned or claimed there.

On cross-examination of said witness, the defendant elicited testimony tending to prove: That he received his instructions as to what property to look after from Mr. Crandall. That he was not employed on behalf of the company by Mr. Crandall, but was employed by Mr. Loring. That it was before he was employed by Mr. Loring that Mr. Crandall gave him the instructions. All that Crandall told him was what property the Altoona owned there, namely, the Altoona Ditch and the Altoona Mine and the Trinity Mine. That when he served notice on Butler to cease using water of Boston Ditch, he did it on his own responsibility, on the assumption that the Altoona Company owned it. That he was on the Altoona Company's property during the mining seasons of 1880, 1881, 1882, 1883, and up to 1888. That he knew the Boston Ditch perfectly well. That he knew it from the Boston Mine down to the end of the Boston Ditch. That the only year during that time when any water ran through the Bos-

ton Ditch down to the Altoona Mine, to my recollection, was in the year 1880, when it was used on the Loring Claim, which at that time was called the Davis Claim. That during the whole time witness was there no water was ever used from the Boston Ditch for mining on the Altoona or Trinity claims to his recollection. That all the water used on those claims was from the Altoona Ditch and no other source. That in the years 1886, 1887, and 1888 there was no mining done of any consequence on the Altoona property. That in the year 1888, when he left there, no living man could have got water through the whole length of the Boston Ditch from the Boston Mine down to the Altoona. That the ditch was filled up and caved in, filled with dirt, rocks, and brush. That it was not possible, when he left there in 1888, to run water through that ditch from the Boston Mine to the Altoona end of the ditch. That in 1885 the, witness as manager of the Altoona Company, had no intention to use the Boston Ditch, because I had no use for it, and because the Altoona Ditch answered better, because the water lasted longer. That in the years 1883, 1884, and 1885 there was water used on the Loring Claim that came from the Altoona Ditch. I did not come up to the mine in 1883 until after they got through sluicing. I came there then and did the retorting. It was some time in July or August when I came there. I went to retorting cinnabar taken out by the company, and Mr. Loring also. Mr. Loring had got through with his washing for the year when I got there. Previous to that I had been there about three days that year, some time in May. The Altoona Ditch was extended on to the divide in

such a way that the water would run on the claims on both sides of the divide, in the spring of 1883. I first saw it when I went there in May, around on the west side of the hill. I saw the pipe line there in 1883. When I said the Boston Ditch was filled up from the Boston Mine down to the lower end, I mean it was filled up like any other ditch. That it was not kept in order. The bank washes down and the rocks and leaves and brush come right in the ditch. There is a great deal of snow up in that country in the winter. When the snow melts there are rivulets of water running down over the banks into the ditch, and in those places there would be rocks and dirt washed down into the ditch. There were no places where any snow slide would cave in the sides of the ditch. The ditch ran through a timbered country. The brush were those that grew along the ditch, and limbs that fell into the ditch. A ditch there needs to be cleaned out every spring to keep it in order. I don't think they could have got water through that part of the ditch without cleaning it out. After 1883 the water was used on the Loring Claim from the Altoona Ditch by Mr. Tisher and Mr. Robinson, and Charles M. Butler and M. D. Butler. That they got the water from witness, as manager of the Altoona Company. That in 1883, 1884, and 1885 no water was put upon the Loring Claim from the Boston Ditch.

On re-direct examination of said witness, plaintiff elicited testimony tending to prove that the extension of the Altoona Ditch over to the Loring Claim was dug before the witness was in there. That the witness did not see any water in the lower portion of the Boston Ditch while he was

there. That before 1883 it was very easy to use water from the Altoona Ditch on the Loring Claim. That the Altoona Ditch was extended to the divide, long before the time of the witness there. That it was extended so as to cross the divide some time in the 70's, so that it was clear across the divide. That in 1888, the Boston Ditch from the Boston Mine westward, was all filled up, because it was not kept in order. That it was caved in all the way, and filled with rocks and dirt, in some places it was even full. That a ditch in that country has to be cleared out every spring to keep it in order, so as to run the water through it. That the witness walked along ditch, time and time again, from the Boston Mine down to the Altoona. That in 1888, there were no places where the water could run at all. That there were not any stretches of from a quarter to half a mile, where the ditch was in reasonably good repair. That in 1891, the witness commenced work for the Integral Company. That he worked for them until about April, 1894. That he was present in 1892, when Mr. McCaw put up a notice at the upper end of the Boston Ditch on Crow Creek. That witness was in the employ of the Integral Company, of which Mr. McCaw was superintendent.

Plaintiff called Charles D. Rhodes as a witness, who testified that he was at present chief draughtsman in the United States Surveyor General's office, for the State of California. He presented a map of Township 38 North, Range 6 West, Mount Diablo Base and Meridian, and stated it was an original document on file in the United States Surveyor General's office for California.

That that township was sectionized by the United States Government as follows: The survey was completed July 20, 1880. The survey was approved by the United States Surveyor General, for the State of California, March 1, 1881, and that the approved plat was filed in the United States Land Office at Redding, July 9, 1881.

C. M. Butler, witness, called for plaintiff. On examination of said witness, plaintiff elicited evidence tending to prove: That he knew the Altoona and Trinity Quicksilver mining claims, in Cinnabar District, Trinity county. That he knows the Altoona and Boston ditches. That he was first there in 1875. That the Altoona Company was working both the Altoona and Trinity claims. That witness was there in 1876, and that he knew of his father, M. D. Butler, commencing to dig the Boston Ditch. That he was there when the Boston Company commenced to work the Boston Mine. That they used the water of the Boston Ditch on the Boston Mine in 1877. That he left there in 1877, and was back in 1879, and then was back again in 1883, August 13th, at the time his father relocated the Boston Mine. That it was about August 13th, 1883 that he was there. That he remained a couple of weeks. His father, M. D. Butler, left at the same time he did. That he next returned in 1885, in the spring. He was out and in that district several times that season. That nobody was working on the Altoona when he was there that year. That Louis Girard was in charge of the Altoona. That no work was done to his knowledge on the Loring Claim in

1885. He was in the vicinity of that claim, but he did not look at it in particular. That his father was there with him during that year and left when he did, and they returned early the next spring. That he was there in 1886 and 1887. That in 1887 he used water sluicing on the Boston Mine from the Boston Ditch. That there was no time in 1887 or 1888 when the Boston Ditch down to the Boston Mine did not get water, and he sluiced with the water at the Boston Mine. They used the ditch full until the water got light, and as long as there was sufficient water to mine with. That he and his father were partners. That he did not use any water on the Boston Mine in 1888. We mined, hydraulicing and sluicing, there on the Boston Mine three years. That some was used on the El Madre Mine from the Altoona Ditch. That in 1889 water was used on the Boston Mine out of the Boston Ditch. That in 1886 and 1887 Mr. Girard was in charge of the Altoona mines, but I did not see him do any work on the mine. During those years I was only at the Altoona Mines just a few times. That Girard had a little garden which he irrigated through the Altoona Ditch. That after his father, M. D. Butler, took charge of the Altoona Company's properties in 1889, that they sluiced and concentrated ore on the Altoona Company's mines with water from the Altoona Ditch every year. That during those years, whenever he saw the Altoona Ditch, water was running in it.

On cross-examination of said witness, defendant elicited testimony tending to prove: That when he and his father went there in 1885, they had to do some work on the

Boston Ditch before they could get the water through it. Had to roll out some logs, take out a good many rocks, and loose dirt that had flowed into it, and there was a break or two in the bank of the ditch. That in 1888 he worked on the Loring Claim with water from the Altoona Ditch. That in no year that he was there did he know, of his own knowledge, of any water being used on the Loring Claim from the Boston Ditch. That in 1876 or 1877 no water was run through the Boston Ditch between the Boston Mine and the Altoona Mine or Trinity Mine or Loring Claim. That in those years he was working on the Altoona Mine, perhaps three hundred yards from the Boston Ditch. He did not notice the Boston Ditch in 1883 or in 1885 between the Boston Mine and the Altoona Mine. That the witness never knew of any water ever having run through the Boston Ditch from the Boston Mine to the Loring Claim. That the Loring Claim in 1888 was called the El Madre. That the witness noticed the Boston Ditch in 1886, 1887, 1889, 1890, 1891, 1892, 1893, and 1894. That in those years, when he noticed the Boston Ditch, he did not see any water running in it, from the Boston Mine down towards the reservoir or towards the Trinity Mine. That from 1887 to 1891 the ditch was filled up with rocks and limbs in places between the Boston Mine and the reservoir, and that one place was level with the surrounding ground for eight or ten feet, he guessed. That there was one place, to his knowledge, where little streams had come down and washed down both banks of the ditch. The little place that was level, there was an opening there, where the ditch was sluiced

away. That he never noticed any place in the ditch where logs were covered up. That in 1885 the ditch was in pretty good shape for quite a distance, but they ran no water through it. That the witness would have known it had they run water through it below the Boston Mine. The finding of a log in a ditch in that country is not unusual. It is a timbered country. The rocks that were in the Boston Ditch caved in from the sides of the ditch in places from the top of the bank, and in other places they came out of the bank of the ditch. The limbs and rocks were rolled in by the snow melting. The place that I spoke of, where it looked as though the lower bank had been sluiced away, it looks as if the ditch was full of water, and broke away the side of the bank, and caused the water to turn down. The ditch bank there is gone only for a few feet. We brought some water around there a good many years ago, to that point, and did not bring it any further. I won't be positive but that we turned the water out there some place, where the ditch was filled up, and in order to do that we would have to cut through the ditch. I don't remember that I cut it, but somebody did cut it. I think that is the way it happened. It was in 1885 that we run the water around to there in the Boston Ditch. In 1885 myself and my father done some work cleaning out the upper portion of the Boston Ditch. We had to clean it out again in the springs of 1886 and 1887, because it fills up, and you have to work on the ditches every spring to run the water through. Where that ditch runs, some portion of the country lies at an angle of about 45 degrees, and in other places it is

quite flat; down to as low as 80 degrees in some places. There are places where it is steeper than 45 degrees. The place where I say the ditch was filled up in 1892, for 7 or 8 feet, is where the wagon road crosses, going from the Boston Mine to the Altoona Mine. It is filled up the width of the road. At that place, there was formerly a bridge to drive over the ditch. When we cleaned out the Boston Ditch, in the springs of 1886 and 1887, we had to take logs out of the ditch, and roll rocks out of it, and use a pick and shovel, and crowbar, and an axe, and saw, to put it in shape. Trees would fall down in the winter with the snow, and we had to use a pick and shovel, and crowbar, every season. The place where the ditch bank was broken, that we took the water to in 1885, we did n't take it any further, because we had no use for it. We talked of sluicing there, and I think there was some words about the water, it seems to me. I did n't have the words myself. The water would not run any further at that time without doing some work cleaning out the ditch.

Charles Allenberg, witness called for plaintiff.

Plaintiff elicited testimony from this witness tending to prove: That he kept the accounts for the plaintiff ever since the plaintiff was organized; that he first visited the Altoona Mine in 1875, in June—next in July, 1877; that when he visited the mines in 1875, Messrs. Lytle and Hawkett were in possession of the Altoona Mines; that when he visited the mines in 1877, the Altoona Quicksilver Mining Co. was in possession; that the witness next visited the mine in July, 1878, and then in

June, 1879, and then in October, 1894; at which times the Altoona Quicksilver Mining Co. was in possession of the mines; that in 1877 the company was using water for sluicing and hydraulicing and concentrating ores, and the same in 1878; that the witness was secretary of the plaintiff; that in 1878 he visited the Boston Mine, and that the Altoona Company was then working the Boston Mine in 1878, using water there.

The following questions at this point were asked the witness:

Question. What water were they using?

To which question the witness replied: I do not know of my own knowledge what water they were using, but there was some water there, and it must have been from the Boston Ditch.

Question. Was there any other way of getting water at that time except through the Boston Ditch?

Answer. Not to my knowledge.

Mr. Campbell, counsel for defendant. I object to that; that is an argument of the witness.

Objection overruled by the Court, to which ruling counsel for defendant then and there duly excepted.

The evidence from said witness further tended to prove that when he visited the mine in 1879 the Altoona Company was sluicing and concentrating by the hydraulic process. That from the organization of the Altoona Company to the present time there have always been three directors—Mr. Jacob Frowenfeldt, William Goldstein, and the witness. That Mr. William Goldstein is a cousin of the witness' wife. That Mr. Jacob Frowenfeldt is a cousin of the witness' wife. That for

a few years Mr. M. Zellerbach was a director, and for some years Mr. Greenman and E. L. Goldstein. That E. L. Goldstein became president of the company in 1879, and remained president until his death, in 1892. That the directors had their principal place of business since 1879, one year at 421 and 423 Market St., and subsequently at 630 Brannan St., San Francisco, which latter place continued to be the office of those gentlemen until April 1st, 1895. That witness had been the general manager of the affairs of the corporation during recent years, since 1877.

At this point the following question was asked the witness by plaintiff:

During that time what has been your intention as the general manager of the corporation with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent.

The objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

To which question the witness answered: Always intended to hold our rights to those ditches.

Question by Plaintiff. In the same connection, what has been the intention with regard to the Boston Ditch and the water right used with the Boston Ditch since the date of the deed from the Boston Company to the Altoona Company in 1877?

To which question counsel for defendant objected, on the ground that the same was immaterial, irrelevant,

and incompetent, which objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

Question by Plaintiff. And what in the same connection with regard to the Altoona Ditch and the right to divert water through it?

Same objection, ruling, and exception.

Answer. The same.

Question by Plaintiff. What use could be made of the water through the Altoona and Boston ditches for the purposes of that company other than what it has actually been appropriated to?

Objected to by counsel for defendant on the ground that it was irrelevant, immaterial, and incompetent, and purely speculative.

Objection overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

To this question the witness answered: Heretofore we have used the water for hydraulicing and sluicing. At present we could use the water for our boilers and condensers also could use it for getting water power to operate our condensers.

Mr. Campbell. I move to strike out the answer of the witness as to what they have done, as not responsive to the question.

The Court. That is not responsive. Strike it out.

Mr. Cross. When he says heretofore it has been used for one purpose—

The Court. You can ask it over. The best rule is to compel the witness to respond directly to the question.

Mr. Cross. Q. Answer the question again, Mr. Allenberg, and make the answer a little more direct. You stated what it had been used for, while the question is what it can be used for.

Answer. We could use the water for water power, to run our machinery by water power.

Question. Why has not the company done so heretofore?

Same objection, ruling, and exception.

Answer. Have not been able to use the lower end of the Boston Ditch, which would give us sufficient power, to get water power for our machinery, to move our machinery.

Question. What advantages would you have as to power when you could bring the water through the Boston Ditch over what you would have in bringing the water through the Altoona Ditch?

Same objection, ruling, and exception.

Answer. The difference in the elevation could get so much more power through the Boston Ditch than through the Altoona Ditch; the higher elevation gives more pressure.

Question. What benefits would accrue to the company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling, and exception.

Answer. It would save us from using steam power, and, consequently, save a good deal of wood to make steam for the boilers. It would also save an engineer.

Question. How much expense per month would it save the company during such months as it would furnish power?

Same objection, ruling, and exception.

Answer. It would save some $600 per month during such time as we had the water power.

The counsel for the defendant moved to strike out the answer. Motion denied. To which ruling the counsel for defendant then and there duly excepted.

Question. Did you see Mr. M. D. Butler in this city during the years 1886 and 1887, from time to time?

Answer. Yes, sir; at my office, on Brannan St.

Question. Did you have any conversation with him at those times with regard to the use of the Boston Ditch and the water there?

Question objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Answer. Mr. Butler came to me on several occasions and asked me for the use of the water, for sluicing boxes, and some for iron pipes; and I always gave him permission to use our water for sluice boxes or iron pipes. He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston Ditch. That was the only ditch that would carry the water on that mine, so far as I know.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co. for the Altoona Quicksilver Mining Claims, dated June 21st, 1895; which patent was objected to by defendant as immaterial, irrelevant, and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Said patent was then introduced in evidence, and reads as follows:

"General Land Office. Mineral Certificate.
"No. 25728. No. 301.

"THE UNITED STATES OF AMERICA.

"To all to whom these presents shall come, GREETING:

"*Whereas*, in pursuance of the provisions of the Re-
"vised Statutes of the United States, chapter six,
"title thirty-two, and legislation supplemental thereto,
"there have been deposited in the General Land Office
"of the United States the Plat and Field Notes of
"Survey and the Certificate, No. 301, of the Register
"of the Land Office at Redding, in the State of Cali-
"fornia, accompanied by other evidence, whereby it ap-
"pears that the Altoona Quicksilver Mining Company
"did, on the twenty-fourth day of August, A. D. 1894,
"duly enter and pay for that certain mining claim or
'premises known as the Altoona Quicksilver Lode
"Mining Claim, designated by the Surveyor General as

"Lot No. 42, embracing a portion of Section 22 in "Township 38 North of Range six West, Mount Diablo "Meridian, in the Cinnabar Mining District, in the "County of Trinity, and State of California, in the dis- "trict of lands subject to sale at Redding, and bounded, "described, and platted as follows, with magnetic varia- "tions, eighteen degrees and fifteen minutes east.

"Beginning at the northeast corner of claim, a ser- "pentine rock 13x9x5 inches, marked A. & T.

"Thence, first course, south nine chains and nine links "to the southeast corner of claim, a granite rock 26x10 "x8 inches, marked A.

"Thence, second course, west twenty-two chains and "seventy-three links to the southwest corner of claim, a "serpentine rock 10x13x5 inches, marked A, from "which Mt. Desert rock bears south eighty-eight de- "grees and thirty minutes east, about three hundred "and sixty chains distant.

"Thence, third course, north nine chains and nine "links to the northwest corner of claim, a serpentine "rock 30x20x12 inches, marked T & A, from which a "pine forty inches in diameter bears north forty-two "degrees east thirty-nine links distant, a pine thirty "inches in diameter bears south forty-three degrees east, "eighty-five links distant; and the corner common to "sections twenty-one, twenty-two, twenty-seven, and "twenty-eight in Township thirty-eight North of Range "six West, Mount Diablo Meridian, bears south twenty- "nine degrees, eight minutes and twenty-five seconds "west, thirty-three chains and fourteen links distant.

"Thence, fourth course, east twenty-two chains and "seventy-three links to the northeast corner of claim, "the place of beginning; said lot No. 42 extending one "thousand five hundred feet in length along said Altoona "quicksilver vein or lode, and containing twenty acres "and sixty-six hundredths of an acre of land more or "less.

"Now know ye, that there is therefore hereby "granted by the United States unto the said the "Altoona Quicksilver Mining Company, and to its suc- "cessors and assigns, the said mining premises hereinbe- "fore described, and not especially excepted from these "presents, and all that portion of the said Altoona quick- "silver vein, lode, or ledge, and of all other veins, lodes, "and ledges, throughout their entire depth, the tops or "apexes of which lie inside of the surface boundary line "of said granted premises in said Lot No. 42, extended "downward vertically, although such veins, lodes, "or ledges in their downward course may so far depart "from a perpendicular so as to extend outside the ver- "tical side lines of said premises; provided, that the "right of possession to such outside parts of said veins, "lodes, or ledges shall be confined to such portions "thereof as lie between vertical planes drawn down- "ward through the end lines of said lot No. 42, so con- "tinued in their own direction that such planes will "intersect such exterior parts of said veins, lodes, or "ledges; and, provided further, that nothing herein con- "tained shall authorize the grantee herein to enter upon "the *surface* of the plane owned or possessed by an- "other.

"To have and to hold said mining premises, together "with all the rights, privileges, immunities, and appur- "tenances of whatsoever nature thereunto belonging "unto the said grantee above named, and to its suc- "cessors and assigns forever; subject, nevertheless, to the "above mentioned and to the following conditions and "stipulations:

"*First.* That the premises hereby granted, *with the* "*exception of the surface*, may be entered by the pro- "prietor of any other vein, to penetrate, intersect, or "extend into said premises, for the purpose of extract- "ing and removing the ore from such other vein, lode, "or ledge.

"*Second.* That the premises hereby granted shall be "held subject to any vested and accrued water rights "for mining, agricultural, manufacturing, or other pur- "poses, and rights to ditches and reservoirs used in con- "nection with such water rights as may be recognized "and acknowledged by the local laws, customs, and de- "cisions of courts.

"*Third.* That in the absence of necessary legislation "by Congress the Legislature of California may provide "rules for working the mining claim or premises hereby "granted, involving instruments, drainage, and other "necessary means to its complete development.

"In testimony whereof, I, Grover Cleveland, Presi- "dent of the United States of America, have caused "these letters to be made patent, and the seal of the "General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, the
" twenty-first day of June in the year of our
" Lord one thousand eight hundred and
[SEAL] " ninety-five, and of the Independence of the
" United States the one hundred and nine-
" teenth.

"By the President: GROVER CLEVELAND.

" By M. McKean,
" Secretary.

" L. Q. C. Lamar,
" Recorder of the General Land Office.

" Recorded Vol. 263, pages 244 to 246, inclusive."

[Endorsed]: Filed at the request of Wells, Fargo & Co., July 8th, A. D. 1895, at 20 min. past 1 P. M., in Book No. 2 Patents, page 407 Records of Trinity County. R. L. Carter, Recorder.

Plaintiff also offered in evidence a patent to the Altoona Quicksilver Mining Co., of the Trinity Quicksilver Mining Claim, situated in Section 22, Township 38 North, Range 6 west, Mount Diablo Base and Meridian, and being lot 41 of said township, identical in its terms, with the exception of the description of the property; to which patent defendant objected on the ground that it is irrelevant, immaterial, and incompetent. Objection was overruled; to which ruling of the Court counsel for defendant then and there duly excepted.

Plaintiff further elicited evidence from the witness Allenberg tending to prove: That the taxes of the Altoona Quicksilver Mining Co. had been paid by that company for every year from August 13th, 1875, except in the

year 1889, when the assessor of Trinity County overlooked making an assessment of the property; the Altoona and Trinity claims have been assessed every year except 1889 to the Altoona Company since August 13, 1875. That from the date of the incorporation of the Altoona Quicksilver Mining Co. to the present day some one representing that company has been present all the time at the Altoona Mines and in charge of the Altoona Mines and the property of the company. The Altoona and Trinity Quicksilver Mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Question. What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant, and incompetent, and referring to matters occurring since the commencement of this cause. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. About $71,000 worth.

Question. To what depth has the mine been worked?

Objected to as immaterial, irrelevant, and incompetent. Objection overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. Two hundred and thirty-one and a half feet.

Question. What is and has been the intention of the company and of yourself, as general manager of the company, with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Answer. Since 1880 we contemplated to work the mine as we are doing now, but we were unable to do so until last year on account of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, Counsel for Defendant. I move to strike that answer out. Motion denied by the Court; to which ruling counsel for defendant then and there duly excepted.

Witness continuing, plaintiff elicited testimony tending to prove: That prior to the commencement of this suit the Altoona Mine was worked to about a depth of 125 feet. That the body of quicksilver ore above that depth had been taken out. The last time I was up there in 1879 the mine looked very well, and the ore showed the whole length of the distance in the drifts and tunnels which were run at that time for about four hundred feet in length, and there was evidence of its going still deeper down. All the ore that I saw there was very good ore.

Question. What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity County, California, from the

time the company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant and incompetent. Objection was overruled by the Court; to which ruling counsel for defendant then and there duly excepted.

Answer. About $257,000.

On cross-examination witness stated: That he could not tell how much of that money was spent on the Trinity Mine, or Altoona Mine, or Boston Ditch, or Altoona Ditch. That there were no segregated accounts kept in the books of the ditch. That he could not tell how much was spent on the Boston Ditch. That he does not know whether a dollar has been spent on the Boston Ditch since 1885 to his personal knowledge. That he only knows it by the reports of the superintendents. That he does know that the company spent some of that money on the Boston Ditch in 1878. That since 1885 the superintendents reported to him that they were cleaning out the Boston Ditch and putting it in repair. That Mr. Butler so reported in 1889. That of the $257,000 he did not know of his personal knowledge whether any was spent on the Boston Ditch.

Question by Plaintiff. Who paid the money?

Answer. The Altoona Quicksilver Mining Co.

Question. What did you have to do with it personally?

Answer. I was secretary for awhile, and paid out the drafts as they came into the office from the mine, and sent money to the mine to pay the indebtedness for labor performed up there at that property.

Mr. Campbell, for Defendant. I move to strike it out. He don't know what it was paid for.

Pending the decision of this motion, the witness testified that the superintendent drew the drafts on the company in San Francisco, to pay for the labor performed up there, and at the same time made requisition for money to be sent up, to pay for things also. Might be some in money and some in drafts, and all those were paid by him, except when he was absent from the city. That he could not testify what portion of that money was paid out when he was absent from the city. It was what might happen to come in, a small amount or a large amount, during my absence from the city. That he kept the books and accounts of the company. That the total time he was absent from the city during those eighteen years, could not exceed five or six months.

Motion denied. To which ruling of the Court, counsel for defendant then and there duly excepted.

On cross-examination, testimony was elicited from the said witness tending to prove that they worked the Boston Mine in 1878. That he saw the water being used at the Boston Mine in 1878, from the Boston Ditch. That the Altoona Mining Co., extended the Boston Ditch from the Boston Mine down to the reservoir in 1878. That it was reported to him by the superintendent, Mr. Crandall, by letter, that the waters of the Boston Ditch were being used on the Trinity or Altoona claims. That Mr. Crandall became superintendent for the Altoona company December 1, 1878, and served until June 1, 1880. That the Altoona Mining Co. had nothing to do with the Bos-

ton Mine since 1878. That the company intended to claim the Boston Ditch ever since 1878, especially for the purpose of putting on water power at the mine. That he then talked with Mr. Lawrence, the superintendent, about it, but they were not in a position to operate the mines during those years on account of the litigation among the stockholders of the Altoona Company. That at the time this suit was commenced in 1893, witness had no doubt about the right of the Altoona Co. to the water in the Boston Ditch. That the putting in of the steam power since the commencement of the suit cost about $50,000. That he never had a survey made of the Boston Ditch until after this suit was commenced. That he never had any measurements taken in relation to the fall of water in that ditch till after the commencement of this action. That he never had any estimate of the amount of water that could be gotten through the Boston Ditch at different seasons of the year. That the witness did not know when on the stand whether a large or small amount of water could be gotten through there. That he never made any efforts to ascertain whether sufficient water could be gotten through there to turn the machinery or not. He knew they could use it for power. He also knew they could get enough for water power. He knew that the ditch was there, and that the water could be got through, but he never knew how much of a head they could get. That he knew they could get through it again; that it was reported to him that the water was got through; that their claim to the property was not made for the purpose of keeping other people off, but for their

own purposes, and to get water there to run the mine: that all that he ever did in relation to the Boston Ditch since 1878 was simply to claim it and think that at some time he would use it for power; that he never knew how much of a head could be got through the Boston Ditch: that since 1878 he never tried to get any water through the Boston Ditch down to the Altoona Mine. That the witness never saw the Boston Ditch until 1894. That in that year he found the Boston Ditch below the Boston Mine pretty well filled up, rocky in places, trees across, and generally in a bad condition. That the water would not run through it from the Boston Mine down to the Altoona Mine at that time. That there never was any resolution appointing him manager of the Altoona Co. That he was manager merely by general consent of the directors. That when witness stated in his direct examination that they had not previously used the water for water power to run their machinery by water power, because they had not been able to use the lower end of the Boston Ditch, which would give them sufficient power to get water power to move their machinery, what he meant was that inasmuch as the Integral Company had deprived them of Boston Ditch, they could not certainly make use of the lower end of the Boston Ditch, that is, from the Integral Mine down to the Altoona Mine. That the Integral Company taking away the Boston Ditch from us, and not being able to get the water through the Boston Ditch, they could not get the water from the head of the ditch down to the Altoona Mine for the purpose of getting water to run their machinery with. The Integral

works are near the Boston Ditch, between the head of the ditch and the Altoona Company's mines; and when the Integral Company takes the water and uses it from the Boston Ditch it does not run through the lower part of the Boston Ditch, and the Altoona Company cannot get it.

J H. Cox, witness, recalled for cross-examination, and on cross-examination defendant elicited facts tending to show that while he was superintendent of the Altoona Co. they had all the water from the Altoona Ditch that they wanted, that is, all that was necessary to run the mines in the way in which they were then running them; that is, sufficient water for steam and condensation. I mean we can get along by operating that mine with steam and by using what water we have got there, and that the amount of water was the amount of water which ran through the boxes which had been built there.

John H. Carter, witness, was called for defendant, and from said witness defendant elicited evidence tending to prove: That he first went to live in the Cinnabar Mining District in 1878, and remained there for a year. That he next went there in June, 1892. That in 1878, when he was there, he was over the Boston Ditch. That when witness first went to the Cinnabar District in 1878 no water was running through the Boston Ditch. That when he first went there in 1892 no water was running through the Boston Ditch. That in 1892 the Boston Ditch from the Boston Mine up to Wiltz Gulch was considerably out of repair. That there were rocks

in it and logs in the ditch, and in some places earth had slid in. That that was before the ditch was cleaned out in 1892. That before it was cleaned out in 1892 it was impossible to run water through the Boston Ditch from Wiltz Gulch to the Boston Mine. The water was turned into the ditch before the furnace was built in 1892. I think it was in July. I will not be positive. That he is familiar with the Boston Ditch from the Boston Mine westward to the reservoir That he worked right around the ditch and over it for two years, working right near it. He was cutting timber for the sawmill of the Integral Company. That in 1878 it was in pretty fair condition, and would probably carry water by looking after it. That no water passed through it in 1878 or in 1879 to his knowledge. That he does not know whether any water was run through it in 1879 or not. That in 1892 that portion of the ditch was in bad condition, filled with rocks, logs, and brush, the banks caved in.

Here defendant's counsel shows to the witness three photographs, marked, respectively, "Defendant's F, G, & H. Witness testifies that the photographs correctly represent certain portions of the ground over which the Boston Ditch ran, and that the photographs were taken August 14, 1894. The witness marks certain places upon photographs at request of defendant's counsel, indicating the line of the ditch on the photographs as near as he knew it. That since he knew the Boston Ditch no water flowed through it to his knowledge from the Boston Mine to the reservoir. That no water ran in that portion of the ditch in 1892,

or 1893, or 1894, but water did run from the head of the ditch to the Boston Mine, through the Boston Ditch in 1892 and 1893, to the witness' knowledge. That in those years the ditch was not in condition to have water run through it.

On cross-examination of the said witness, plaintiff elicited testimony tending to prove: That in 1878 the witness went there on December 1st. I might probably be mistaken about the year I was there. I think I am sure what year I went there, but I might be wrong. Mr. Crandall had just taken charge of the mine. When he went there it was not a time of year when there would have been water in the ditches to any extent, and that it was not strange that he did not then see any water running in the Boston Ditch. That in 1879 he crossed the Boston Ditch a great many times. That he was there in 1879 until some time in November or December. That he knew the Loring Claim and the Trinity Claim. That he does not know that in 1879 Mr. Crandall worked on the lower end of the Loring Claim, and the upper end of the Trinity Claim, with water from the Boston Ditch. That if he did, it was not while witness was there. That witness left in the fore part of the winter. That he is not positive but that it was 1879 that he went there, and 1880 when he left. That he has never freshened his memory of the thing at all, and it was years ago, and it cut no figure with him particularly that he knew of. Witness testified that he saw defendant's Exhibit B. That Mr. Simpson, the manager of the Integral Mine took it. That when witness was in the vicinity of the Boston Mine in 1892, 1893, and 1894, he was

working for the Integral Company, cutting timber. That he cut timber between the Integral Mine and the reservoir, in the two seasons of 1892 and 1893. That a great deal of the timber he cut above the ditch. That there has been cut there probably 200,000 feet of logs above the ditch. When I went there, there had been a great deal of timber cut above the ditch. There was lots of fallen timber both above and below the Boston Ditch, on the hillside. All the logs that were cut there in 1892 and 1893, were hauled to to the mill to make lumber—all that was fit for lumber. The rest was left on the ground on the hillsides. That it is not strange that there were some logs in the ditch in 1894. In cutting timber we cut off a great many limbs and boughs, and they were left on the ground on the sidehill above the ditch. That the day the photographs were taken, the Boston Ditch was taking water from Wiltz Gulch. That he did not see the ditch above the Wiltz Gulch on that day. That the water was running in the ditch four or five inches deep, and about eighteen inches wide. On that day the Altoona Ditch was getting more water than was running in the Boston Ditch. That in 1892 the witness first went to the Integral Mine, in May, and stayed one day and one night. He did not go to the Boston Ditch at that time. That he has no recollection of seeing the Boston Ditch at that time. He went back there on the 20th of June, 1892, and remained there. He was at the mine when the Integral Company turned the water into its ditch in 1892. They were hurrying to get up a sawmill, and as quick as the mill was up the water was

turned in to carry the sawdust off. I think the water might have been in the ditch before we used it at the mill. I cannot say. I think the water came down to the sawmill first some time in July. I went along the Boston Ditch from the Boston Mine to Wiltz Gulch some time between the 20th of June and the last of July. The ditch had not been cleaned out at that time. That while witness was cutting timber there above the Boston Ditch in the year 1892 and 1893 he rolled one log into the ditch, but it was taken away. That probably other logs rolled into it during that time when the teamsters came around to haul out logs. The teamsters may have got logs in and taken them out again. That he saw Mr. Simpson take the photograph marked defendant's Exhibit F, and recognizes the place where it was taken. That witness came up just as Mr. Simpson set his instrument for taking a picture. Simpson took it, and they looked at the negative and passed on. That the ditch was on a grade there of 16 or 18 inches to the rod, and runs down a steep place just above the reservoir. You could see where the water had cut down to the bedrock. You could see the bedrock there where the water had run in the ditch. That possibly there is no place represented in the picture where the bedrock could not be seen in the bottom of the ditch. I think there was a place there where the ditch had overflowed its banks. The reservoir is constructed in a flat, and has an outlet at the lower end. The place where the ditch is shown on the photograph the ditch was a foot or a foot and a half deep and two

or three feet wide. That the ditch is running down the hill with a steep grade. The next exhibit represents the ditch between the reservoir and the Boston Mine, where it runs down a hill with a grade of about one-eighth pitch. It was a natural depression where the ditch runs in that picture and didn't need much digging to make the water run there. A natural depression on the side of the hill was almost sufficient. Witness shows where the ditch runs on the exhibit. The ditch was about two feet wide there and a foot deep and had a steep grade of several inches to the rod, and would carry lots of water.

Defendant called Ambrose B. McCaw, and from said witness defendant elicited testimony tending to prove, that he first went to the Cinnabar Mining District in November, 1891. That in 1892 Alexander McCaw was general manager of the Integral Quicksilver Mining Co., and he was engaged in no other business. That he was at the mine in the month of June, 1892. That the witness resided in the Cinnabar Mining District from 1891 to 1894 most of the time. That he resided at the Boston Mine. That is the same mine now operated by the Integral Company. That he is familiar with the Boston Ditch. That he first saw the Boston Ditch in 1892. That the Integral Mining Company first turned water into the Boston Ditch in July, 1892. That in 1892, 1893, and 1894, the Integral Company used water sufficient to fill up a two-inch pipe from the Boston Ditch. That was all the water they took in the season of low water, which would be in July, August, and September. That when he first saw the Boston Ditch there was a little water running through it. That he first noticed

the ditch in May and June when the snow went off. That that was about all that ran down the ditch, as no water was allowed to run to waste. Water was also run to the Integral sawmill to carry off the sawdust and feed the boilers. The water was also used to feed the engine and hoisting works, and for the condensers. The Integral Company has used the water for those purposes since in 1892. That the Integral Mining Company used no more water than that until the spring of 1895, after commencement of this action. That since 1892 no water flowed through the Boston Ditch from the Boston Mine down to the reservoir or at any time since witness has known the ditch. That no water could go through it, because it was filled up, mostly all filled up with slides.

The defendant next offered in evidence the Receiver's receipt of the United States Land Office at Redding, which reads as follows:

"RECEIVER'S RECEIPT.

"(Duplicate to be given the Purchaser).

"Mineral Entry, No. 294; Lots, "Nos. 50, 51, 52, 53 & 54. } UNITED STATES LAND OFFICE,

"at Redding, California,

"October 11th, 1893.

"Received from the Integral Quicksilver Mining Com-"pany (a corporation) by Alexander McCaw, attorney "in fact, the sum of five hundred and fifteen 00-100 "dollars, the same being payment in full for the area "embraced in that Mining Claim known as the 'Boston "'Consolidated Quicksilver Mine,' in Township No. 38

"North, of Range, No. 6 West, Mt. Diablo Meridian, "designated as lots Nos. 50, 51, 52, 53 & 54, said "Lot No. 50, extending 1494.2 feet in length along the "Boston Lode; Lot No. 51, extending 1500 feet in length "along the Elson Lode; Lot No. 52, extending 1494.2 "feet in length along the Spencer Lode; Lot No. 53, "extending 1494.2 feet in length along the Lake Lode; "and Lot No. 54, extending 1494.2 feet in length along "said the Kansas Vein or Lode. There is no lot, sur- "vey or claim to be excluded from this claim, as sur- "veyed and claimed. Said lode claim, as entered, em- "bracing 102.80 acres in the Cinnabar Mining District, "in the County of Trinity, and State of California, as "shown by the survey thereof.

"$515.00. JOHN V. SCOTT,

"Receiver."

Defendant also offered in evidence Patent of the United States to the Integral, Central, Garnet, and Ruby Lode Claims, dated the 4th day of December, 1893, which was a Patent in the usual form, by which, on the 4th day of December, 1893, the United States conveyed to the Integral Quicksilver Mining Co. that certain mining claim or premises known as the Integral Consolidated Quicksilver Mining Claim, consisting of the Integral, Central, Garnet, and Ruby Lode Claims. Said Patent contains the same granting terms, provisos, conditions and stipulations as the Patent to the Altoona Quicksilver Mining Company hereinbefore set out verbatim.

Defendant further elicited from said witness McCaw

testimony tending to prove: That he was familiar with the country in the Cinnabar Mining District. That he assisted in surveying said claims. That the claims covered by the Register's Receipt offered in evidence, are the five claims marked on defendant's map (Exhibit No. 2), as the Kansas, Lake, Spencer, Boston, and Elson claims. That the mining ground covered by the patent to the Integral Quicksilver Mining Co., are the claims marked on said map as the Integral, Central, Garnet, and Ruby claims. That the witness had theretofore seen the map, defendant's Exhibit 2. That the said map correctly delineates the various mining claims and ditches. That the map is correct. That the Boston Ditch runs through the Boston claim for about 1,500 feet. That the defendant, the Integral Quicksilver Mining Co. expended about $150,000 to $200.000 on their works. That they sunk on the Boston Mine about 280 feet. That they have hoisting works, sawmill, timber sheds, water sheds, tramway, boarding-houses, store, and miners' cabins. That the water from the Boston Ditch is absolutely necessary for the use of the Boston Mines. That the furnace of the defendant could not be run without it.

On cross-examination, the witness testified as follows: That the two-inch pipe, which he testified to in his direct examination, was two inches in circumference. (This witness testified on his direct examination that he was a mechanical engineer by profession.)

Q. What do you mean by circumference?

A. Round.

By a Juror. Q. Or through. A. Through.

Mr. Cross. Q. Which do you mean, two inches through or two inches around?

A. Two inches round.

Q. It is round, but is the pipe two inches through from one side to the other? A. Yes, sir.

Q. That is what you mean? A. Yes, sir.

Q. You are a mechanical engineer by profession?

A. Yes, sir; supposed to be.

Q. Do you know what the diameter of a pipe is?

A. I should.

Q. Which way of a pipe is the diameter; is it through it or around?

A. Well, it is around it, I believe.

Q. Now, you think it is around it. Is it around it on the inside or on the outside?

A. It is right across.

Q. On the inside or the outside?

A. On the inside, it is right across.

Q. On the inside, that is, it is two inches in the clear? A. Yes, sir; two inches in the clear.

Witness further testified that the water was taken from the Boston Ditch by means of an open flume or box eleven inches by twelve, 150 or 200 feet to the upper end of the pipe. That the grade of the flume is not quite half pitch. That the iron pipe he testified to was put in in 1892. That it runs to the furnaces. That there is another two-inch pipe that runs to the hoisting works; a pipe two inches through. That since 1892 they did not use any water at the sawmill, because they could not get enough to carry the sawdust off. That at

one time they did get water from the Boston Ditch to carry the sawdust off. That it did not go through any iron pipe, but went through a V flume. There was one pipe two inches in diameter went to the hoisting works, one pipe two inches in diameter went to the furnaces, and a V flume to the sawmill. That when he testified on his direct examination that all the water ran through a two-inch pipe, he meant in 1892. That they took the water to the sawmill in the spring of 1893. That they started the sawmill in July, 1892. That the V flume was about 8 inches by 6, with a grade of about 4 inches to the 100 feet. That the water ran through the V flume about a month in 1893, and then they could not get any more water through it. That was in August. That the pipe to the hoisting works is placed at an angle of about 35 degrees from the horizontal. That the pipe to the furnaces doesn't run as steep as quarter pitch. That the waterway running from the ditch down, since the Integral Company has been using the water, has cut a great waterway. That during the last spring they used the water from the Boston Ditch for ground sluicing, and that they were using the water at the hoisting works last week. That the works ran regularly from December, 1893, until October 1, 1894. That the hoisting works had run altogether about ten months. It is about 75 feet from the Boston Ditch down to the hoisting works on the slope. The ditch is above the hoisting works. That to witness' best judgment it is about 100 feet perpendicular from the collar of the shaft at the hoisting works to the bottom of the Boston Ditch immediately opposite. That they have to draw all of the

water out of the Boston Ditch at that place to use it, and it never gets back into the ditch again. The water was used at the hoisting works for steam purposes. At the hoisting works we pumped a constant 3-inch stream—a stream three inches through—and let that water run to waste through the tunnel. We could use that water for our purpose if we needed it.

Thomas K Cummins, witness, was called for defendant, and by said witness defendant elicited evidence tending to prove: That he was in the Cinnabar Mining District before any mines were taken up there. That he knows the Altoona and Trinity claims, and the Altoona Ditch and the Boston Ditch. That he last saw them in the fall of 1891, and first saw them when they were originally dug. That he was in the mines every season from the time he first went there until after 1881. That from 1886 to 1891 he had a camp there. That he was there every season during those years. That since 1886 he has known the Boston Ditch between the Boston Mine and the Altoona Mine, and that he saw it at the time it was first dug, but does not recollect what year that was. That from the year 1886 to the year 1891 there was no water ran in the Boston Ditch from the Boston Mine to the Altoona Mine or reservoir. That years before that he saw water run through that portion of the ditch and into the reservoir. That he can recollect only on one occasion. That from 1886 to 1891 there was a good deal of loose float rock and sediment in the Boston Ditch from the Boston Mine down to the reservoir. Every winter when the snow goes off it will in places slide the debris down.

As it is melting, the snow itself becomes heavy, and the rains will wash it down. There is a good deal of loose float rock—fine rock—and also sediment along that side between the Boston Mine and where the ditch drops down to the reservoir. You can take any ditch in the world, and if it is not attended to every winter, it will have to be cleaned out in the spring in a snow country. That that portion of the ditch would not carry water without being cleaned out. I never went there for the purpose of looking to see whether the ditch would carry water, or anything that way. I was examining the ground there to see where I would set stakes, and surveying around to see what ground I would take up. It was with a view of locating a mining claim. That is what I was doing there. I noticed three places where the ditch would not carry water; one near the Boston Mine, where the lower bank of the ditch had been cut away, and the debris from the snow and rains had filled it up. I could not state how near it had filled the ditch, I did not measure it. I could see the outside of the bank of the ditch, and a little on the inside of the lower bank. The upper part of the upper bank would show there. The ditch was not cut away. It was filled up with a little slide. I never saw the ditch even full of water from 1886 to 1891. The stuff that it filled into the ditch in that place, had washed or slid down from the upper bank. That fill was from 10 to 20 inches long. The next place where the ditch was in bad condition was above the Doliff Claim. There there is a shallow ravine, and on each side of it a slide had come into the ditch from above. Each of these slides was

more than a foot long. I could see the lower bank of the ditch at that place. I don't know whether I could see the inside of the lower bank of the ditch or not, but I could see the inside of the upper bank of the ditch. The third place was between the Doliff and the Carr Claim. It was similar to the one I have just described. It was filled up so that you would have to clean it out before you could run water. I can't tell how much of the inside of the bank of the ditch I could see at that place. In 1886, I went to the Cinnabar District in April, and left in November. Part of the time my camp was about two miles from the Boston Mine, and the rest of the time about three miles and a half, and I was in and out from my camp during that season. In 1887 and 1888 I had a cabin below the Boston Mine. In those years I saw Mr. Butler at the Boston Mine mining.

Mat Young, witness, was introduced by defendant, by whom defendant elicited testimony tending to prove: That he had been in the Cinnabar Mining District since 1891, in the spring. That he knew the Boston Ditch. That in 1891 he didn't pay any attention to it, but it was in no condition to run water through. He has noticed it since 1891. That it is filled up more than it was in 1891. That every spring the bank caves in, and it keeps filling up more. That it was filled up in places—slides off from the banks all along. That in some places it was full—pretty near full, and in other places it was not so full. That it was filled more or less all along the ditch. That since 1891 below the Boston Mine down to

the reservoir it was filled up more than it was then. That in 1892 the Boston Ditch from the Boston Mine to Wiltz Gulch was pretty well filled with rocks, and in some places boulders were in it, and logs and limbs. That it was in no condition to run water through it before it was cleaned out. There was a deep cut on the ditch for a hundred or a hundred and fifty feet where the dirt had run down in the ditch and filled it up a foot over the ditch. That was the worst place on the ditch. That the witness and a man named Walker cleaned it out in 1892. That they used a pick and shovel in cleaning the ditch. That it was baked so hard at the bottom of the ditch that you had to pick it up before you could shovel it. That in September of the present year he crosses the Altoona Ditch and the water was running through it, filling the Altoona Ditch about two-thirds full. On cross-examination, the witness testified that he went expressly to look at the ditch just before he came down here to be a witness on the 6th of this month. That the other times when he visited the ditch he was going hunting. That he had worked for the Integral Mining Company off and on since 1891. That he helped clean the Boston Ditch from the Integral Mine to the Wiltz Gulch, and from the Wiltz Gulch to Crow Creek. That only two of us worked on the ditch, and it took them only about three weeks to clean it out. That they found nothing in the ditch but what they could take out with a pick and shovel. That the cut he spoke about, where the ditch was filled up at the most to the depth of a foot, was where the ditch ran around a point, and the cut was

eight or ten feet deep. The material was material that had dropped off of the sides of the bank until it got about a foot deep. The banks of the ditch there were almost perpendicular, and were composed of dirt and loose rocks in the dirt. In July or August, 1891, he walked along the Boston Ditch from Crow Creek to where the ditch drops off into Wiltz Gulch. There is about two miles of the Boston Ditch between the Integral Mine and its head on Crow Creek, leaving out the portion where the water runs in natural channels. When Walker and I worked we only worked week days. Walker and I did all the work that was done on that ditch that year. The water was turned into that ditch in 1892, about the first of August. I helped to do it. I had nothing more to do with that ditch that year. I have cleaned it out several times since. I worked on it some in the spring of 1895. Where we had to use the pick in cleaning out the ditch was where the water running in the ditch had settled it there. It will do that in any ditch.

J. R. Hudson, called in rebuttal for the plaintiff, testified: I am a photographer and artist. I have been engaged in the business about 27 years, and have practiced my vocation in Illinois and California. Witness is shown defendant's photograph Exhibits B, C, D, E, F, and G, and testified that he heard Mr. Carter's testimony concerning Exhibit B, that the negative from which that was printed was shown him right on the ground where the photograph was taken, immediately after the negative was taken. That if it had been so

shown to Mr. Carter nothing would have been visible on it. That a negative has, after being taken, to be put in an artificial light or chemical light and solutions of chemicals that have been devised for the development of the picture, before it can be seen at all—before anything in the nature of a picture can be seen. That if the negative had been shown to Mr. Carter there on the ground, no photograph could ever have been printed on it, because the action of the light would have obliterated it. The light would destroy the negative. To have exposed it to light before it had been in the dark room would entirely destroy the picture, so that no photograph could be produced from it. Witness having examined defendant's Exhibits E, F, and G, testified that the photographs are on gelatine surface paper, and have been taken so long that the pictures have become dimmed, and the picture flattened out. That the strength of the picture is gone. That the whole field is whitened, and the shadows have been so affected by overtime, that it makes the entire surface represented in the picture look flat. That the pictures were taken with the light in such a direction as not to show the shadows, even of the trees. That in pictures taken in that way it is almost impossible to show depressions. The effect would be, that the picture does not show the actual depressions in the surface of the earth. It has a tendency to make it look as though there were little or no depressions there. Taken in the way the pictures were, it would be impossible to give the depressions in the subject. That the only way to show the depressions correctly is by showing a shadow

in the picture. Witness then examines the portions of the picture marked by the witness Carter, and says that from his study of the photograph, and from his knowledge of photography, that the ditch at the various places marked and represented is from 16 inches to 3 feet deep. That he cannot tell the exact depths of the ditch from the photographs, but that he can come very near it.

The case being closed, the Court instructed the jury as follows, to wit:

The Court. Gentlemen of the jury, I am about to submit to you the propositions of law which you are to consider in this case in connection with the facts.

The complainant in this case states two causes of action; one in ejectment for the recovery of the Boston Ditch—I designate it by name as you have already become familiar with it—one in ejectment for the recovery of the Boston Ditch and water rights; and one essentially for damages for the diversion of waters from the Altoona Ditch. The plaintiff has waived a recovery for damages, which makes it unnecessary to pass on the latter cause of action—that is, the cause of action for the diversion of waters from the Altoona Ditch. I therefore withdraw it from your consideration. So that there will be no misunderstanding, I repeat: I withdraw from your consideration the cause of action regarding the Altoona Ditch. This, gentlemen of the jury, is the Court's action to a certain extent, and is more or less technical, and you should not let it affect your consideration of the other cause of action, or standing of either

of the parties in the case in any way at all. Your inquiry then will be confined to the rights of the parties respectively in and to the Boston Ditch, and the water rights connected with it.

Before stating the specific propertions of fact involved in this inquiry, I will state that the right to the use of water in a running stream may be acquired either by posting notices, under the Code of this State, and otherwise complying with it, or by an actual appropriation and use without posting the notices, and as between appropriators, the one first in time is the first in right. The original appropriation by the Boston Ditch, was by the latter method—that is, by possession and use. The defendant claims by the former—that is, by posting notices and complying with the Code.

It is conceded that the Boston Cinnabar Mining Company constructed the Boston Ditch, or rather it is conceded that the ditch was first commenced to be constructed by Mr. Butler, and afterwards completed by the Cinnabar Mining Company, and it is claimed by the plaintiff in this case that it thereafter, that is, the Boston Cinnabar Mining Company—conveyed the ditch and water rights to it, the plaintiff, and plaintiff also contends that it diverted water through the ditch and applied the same to useful purposes and let it to others to be applied to such purposes.

This brings us to the three propositions of fact involved in the inquiry of the respective rights of the parties in and to the ditch. They are as follows :

First. Is the plaintiff the grantee of the original owners of the Boston Ditch ?

Second. If not, did it acquire the right to the ditch and water by possession and use?

Third. Or if either, did it abandon such ditch and use.

On the first proposition there is a deed introduced in evidence from the Cinnabar Mining Company to the defendant, dated 16th of August, 1877. This deed conveyed the right and title in the ditch and water to the plaintiff if at its date the Boston Mine had not been abandoned. It is necessary, therefore, for you to find the date of the abandonment of the mine, and if you find that the mine was abandoned before the deed was executed, the deed passed no right or title to the water, and you must find on that issue for the defendant; that is, you must find that the plaintiff is not the grantee of the Cinnabar Mining Company. If, however, you should so find, you will consider the next proposition: did plaintiff acquire a right by possession and use before defendant's appropriation or attempted appropriation. If you find it did not you will find on this issue for defendant—indeed, you will find a verdict for defendant, for that will determine the case, for, if the plaintiff was neither the grantee of the Cinnabar Company, nor acquired rights after abandonment by such company, it cannot recover. If you, however, find on that proposition for the plaintiff, you will consider the next proposition: did it after acquiring such rights lose them by abandonment?

The law provides that an appropriation must be for some useful or beneficial purpose, and when the appro-

priator or his successor in interest ceases to use it for such a purpose, the right ceases. This does not mean that the appropriator is confined to the first use or to the first place of use. He may change both if others are not injured by the change. The ditch may be extended to places beyond that where the first use was made. The right then which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such an abandonment there must be a concurrence of act and intent, viz: the act of leaving the premises or property vacant so that it may be appropriated by the next comer, and intending not to return.

The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon be held to amount to an abandonment. Abandonment, therefore, is a question of fact. Yielding up possession and non-user are evidence of abandonment, and under many circumstances sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by evidence which shows that notwithstanding such nonuser or want of possession the owner did not intend to abandon it.

Use of the ditch and water by any other person by permission of the owner is sufficient to maintain the owner's possession, or right of possession, as though it were used by the owner.

Gentlemen of the jury, those are the propositions of law for you to apply to the facts. I think I can trust

you to apply them without any attempted application myself, considering the elaborateness with which the evidence was introduced, and the ability with which the case was argued.

If you find that the plaintiff was the grantee of the Cinnabar Mining Company, or acquired a right to the water in the manner I have indicated to you, by possession and use, and has not abandoned the same, you will find for the plaintiff. If you find that it was not the grantee of the Cinnabar Mining Company, or did not acquire an appropriation of the ditch as I have instructed you, or that it has abandoned its rights, if it had any, you will find for the defendant.

Your verdict, gentlemen, will be comparatively simple. In this Court it requires a concurrence of all of you to find a verdict. I mention this because in the State Court three-fourths of a jury can find a verdict. It must be unanimous in this Court.

You will retire to your jury-room and select one of your number as foreman, and when you have agreed on a verdict you will return into Court.

I have prepared forms of verdict for you, gentlemen of the jury. If you find for the plaintiff, your verdict will be: "We, the jury, find in favor of the plaintiff." Damages you have no concern with. While there is an allegation of damages in the complaint on the first cause of action, the damages are waived; hence, you should not find on damages. If you find for the defendant, the form of your verdict will be: "We, the jury, find in favor of the defendant." Whichever one of these forms you agree on, you will so declare by your verdict.

Mr. Cross. Your Honor has used the word "or" there in one place where you meant to use the word "and" in the last charge, where you said if they find that the Boston Mine was abandoned before the deed was made, "or" that the plaintiff did not appropriate the water—that word should have been "and."

The Court. I will repeat it. I will repeat the oral part. If you find from the evidence that the plaintiff in the case was the grantee of the Cinnabar Mining Company, and you also find from the evidence that it did acquire rights to the water after the abandonment of the out of the Boston Ditch so that it would go down to the Boston Mine by the Cinnabar Company, and also find that it has not abandoned such rights, if it had any, you will find for the plaintiff. If, on the other hand, you find that the plaintiff did not acquire any rights from the Cinnabar Company—in other words, was not its grantee, or did not acquire any rights independent by the use and possession after the abandonment of the Boston Mine, or, if you find it was such grantee, or did acquire such rights, but abandoned them—you will find for the defendant. Is that clear?

Whereupon, counsel for defendant, in the presence of the jury, excepted to that portion of the foregoing charge which reads as follows, viz:

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. To "constitute such an abandonment, there must be a con- "currence of act and intent, viz, the act of leaving the

"premises or property vacant so that it may be appro-
"priated by the next comer, and intending not to re-
"turn."

Defendant also excepted to that portion of the instructions reading as follows:

"The mere intention to abandon, if not coupled with
"yielding up possession or cessation of user is not suf-
"ficient; nor will the nonuser alone, without an inten-
"tion to abandon, be held to amount to an abandon-
"ment. Abandonment is therefore a question of fact.
"Yielding up possession and nonuser are evidences of
"abandonment, and under many circumstances sufficient
"to warrant the deduction of the ultimate fact of aban-
"donment. But it may be rebutted by evidence which
"shows that notwithstanding such nonuser or want
"of possession the owner did not intend to abandon it."

Defendant also excepted to that portion of the charge reading as follows:

"Use of the ditch and water by any other person by
"permission of the owner is sufficient to maintain the
"owner's possession, or right of possession, as though it
"were used by the owner."

Counsel for defendant also excepted to the charge of the Court on the ground that the Court in his charge to the jury omitted one of the elements of abandonment, in this:

"That one of the elements of abandonment is left
"entirely out—that is, no matter how strong the inten-
"tion is to use the water, or take the use of the water,
"or continue to use it at another time, still, if at another

" time they do not use it or begin to use it, or commence " work looking to the use of it in the near future, that, " then, is abandonment, no matter how strong their " intention in the future is. They must do some active " work applying the water to that use or some other " beneficial use."

Prior to the submission of the case to the jury, defendant, in due form and in writing, asked an instruction to the jury as follows:

" The use required by the statute to entitle a person " to the waters of a stream must be an actual use for " some beneficial purpose. It is not sufficient under the " law that there be simply a claim to the water without " any use. And if you find from the evidence that the " plaintiff, the Altoona Quicksilver Mining Company, " did not, since the year 1881, use any of the waters " that ran through the Boston Ditch, and did not in " good faith intend to use them, but allowed the ditch " to go to ruin and decay, so that the same could not be " used as a ditch, but claimed the Boston Ditch and " water right for the sole purpose of preventing others " from using said water for a beneficial purpose, I charge " you that such a claim is not sufficient to entitle plain- " tiff to the possession of said ditch in this action, " and you should find for the defendant upon that branch " of the case."

Which instruction the Court refused to give. To which refusal of the Court the defendant in due form, and prior to the submission of the case to the jury, in the presence of the jury, duly excepted.

Prior to the submission of the case to the jury, the defendant, in due form and in writing, requested the Court to instruct the jury as follows:

"No appropriation of water can be made for purely "speculative purposes, and the right to use water can "only be acquired for the purpose of applying it to a "beneficial purpose, and as soon as the purpose ceases, "the right to use the water ceases at once, unless the "appropriator, within a reasonable time, takes active "steps to apply said water to another beneficial use.

"A person cannot hold the right to use water against "the subsequent appropriator by an intent formed in the "mind to, at a future date, put the water which he has "ceased to use to another and different purpose or use, "unless he begins active work upon the new use within "a reasonable time after he has ceased to use the water "for the original purpose, and prosecuted the same dili-"gently to a conclusion. The law does not permit a per-"son to hold water for speculative purposes, and no mat-"ter how good the intentions of the appropriator may "be to use water for a beneficial purpose in the future, "still, he is only allowed a reasonable length of time, "consistent with the magnitude of the work necessary "to use the water, and his diligent and reasonable exer-"tions to complete the work."

The Court refused to give such an instruction; to which refusal of the Court, defendant by its counsel, then and there, and in the presence of the jury, before the case was submitted to them, duly excepted.

Counsel for defendant also, before said case was sub-

mitted to the jury, duly and in writing requested the Court to instruct the jury, as follows, to wit:

"By act of Congress, the government of the United "States has given to the appropriators and users of "waters the right to run their canals and ditches over "the vacant and public lands of the United States. The "right to run canals and ditches does not give the party "building the same any title to the land, except the "right of way across it. The right is merely an ease-"ment, and continues only so long as the ditch is used "to convey water for a needful and beneficial purpose, "and whenever the party who built the ditch, or his "successors in interest ceases to use the same for an un-"reasonable length of time for the purpose of conveying "water to be used for a needful purpose, then the rights "of the party who built the ditch, or his successors in "interest, ends, and any person may enter into and upon "said ditch and use the same to convey water for the "purpose of applying it for a beneficial use, and the "party who built the ditch, or his successors in interest, "cannot complain."

The Court refused to give such an instruction, and defendant, by its counsel, prior to the submission of said case and in the presence of the jury, duly excepted to such refusal.

The defendant by its counsel, prior to the submission of said case to the jury, in due form and in writing, requested the Court to instruct the jury as follows, to wit:

"The test of the right to water in this State is gov-"erned by appropriation, use and nonuse. The right of

"a party to use water for a beneficial purpose continues "as long as the water is actually applied to that use, or "to some other beneficial use, and terminates when the "use is discontinued. The original use, however, can- "not be changed by the original appropriator or his suc- "cessor in interest to the detriment of a subsequent "appropriator, nor can the original appropriator or his "successors in interest assert, against a subsequent ap- "propriator, his intent to change the use of the water to "another purpose which will be injurious to a subsequent "appropriator, unless the first appropriator has done "some act and used due diligence within a reasonable "time towards the making of said change prior to the "appropriation of said water by another person. If the "purpose for which the water was originally appropriated "has failed, the first appropriator cannot hold that water "indefinitely for any other purpose, unless he takes "active steps to do so within a reasonable time and be- "fore others have appropriated the water. The doctrine "is that no man shall act upon the principle of the dog "in the manager either in the appropriation of water, "for which he has no present use, or in the holding of "water which he has ceased to use."

The Court refused to give such an instruction. To which refusal, defendant, by its counsel, before the submission of the case to the jury, and in the presence of the jury, duly excepted.

The foregoing Bill of Exceptions was presented in due season, is correct, and is settled and allowed by me this Dec. 26th, 1895. JOSEPH McKENNA,

Circuit Judge.

[Endorsed]: Filed Dec. 26th, 1895, W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Petition for Writ of Error.

To the Honorable the Circuit Court of the United States, for the Ninth Circuit, Northern District of California:

Your petitioner, the Integral Quicksilver Mining Company, defendant aforesaid, represents that defendant's Bill of Exceptions in above case has been settled, allowed, and filed; that his assignments of error have been this day filed. Wherefore, petitioner respectfully requests that an order be entered allowing a writ of error from the Circuit Court of Appeals to this Court in above case.

S. F., Dec. 30th, 1895.

E. W. McGRAW,
Atty. for Deft.

[Endorsed]: Filed Dec. 30, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court-room in the City and County of San Francisco, on Monday, the 30th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable James H. Beatty, District Judge, District of Idaho, assigned to hold and holding Circuit Court for the Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
vs.
INTEGRAL QUICKSILVER MINING CO., } No. 11872.

Order Allowing Appeal.

Upon motion of E. W. McGraw, Esq., attorney for plaintiff, and on filing a Petition for a Writ of Error and an Assignment of Errors, it is ordered that a Writ of Error be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit herein.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING COMPANY,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING COMPANY,
Defendant.

Assignment of Errors.

I.

The plaintiff offered in evidence the Notice of Location of the Trinity Mining Claim by John A. Lytle, A. W. Hawkett, and James McK. Crow, dated August 8th, 1872, and recorded in the office of the Recorder of Trinity County, California, August 15th, 1872, to the introduction of which notice in evidence defendant objected on the ground that the same was irrelevant, incompetent, and immaterial. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

II.

Plaintiff offered in evidence a deed dated August 1st, 1873, from James McKinley Crow to John Gray, of Crow's interest in the Trinity Mine, acknowledged the same date, recorded in the County Recorder's office of

Trinity County, August 4th, 1873. Also a deed from John Gray to David McKay of the same interest, dated August 2, 1873, acknowledged the same date, and recorded in the County Recorder's office of Trinity County, August 4, 1873. Also a deed of the same property from David McKay to Fred H. Loring and Augustus Rumfeldt, dated September 23, 1874, acknowledged the same date, and recorded in the County Recorder's office in Trinity County, September 28, 1874. Also a deed of the same interest from Rumfeldt and Loring to A. W. Hawkett and J. A. Lytle, dated October 5, 1874, and acknowledged the same date, and recorded in the County Records of Trinity County, October 19, 1874. To each of which conveyances defendant objected, on the ground that the same were irrelevant, immaterial, and incompetent; which objections were overruled by the Court; to which rulings of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

III.

Plaintiff offered in evidence Notice of Location of the Altoona Mine by John A. Lytle, dated September 26th, 1874, and recorded in the office of the Recorder of Trinity County, October 15th, 1874; which was objected to by defendant as immaterial, irrelevant, and incompetent. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

IV.

Plaintiff offered in evidence a series of mesne conveyances: a deed from John A. Lytle to Philip W. McCarthy of the undivided one-tenth of the Trinity Quicksilver Mine, dated October 17, 1874, acknowledged the same date, and recorded in the County Recorder's Office at Trinity County, October 23, 1874. A deed from Lytle and McCarthy to Marks Zellerbach, dated July 1, 1875, of the undivided one-half of the Trinity Claim as located by Hawkett, Crow and Lytle, acknowledged July 7, 1875, and recorded July 19, 1875, in the Recorder's Office of Trinity County. Also a deed from A. W. Hawkett to Marks Zellerbach, dated August 13, 1875, acknowledged the same date, and recorded in the County Records of Trinity County, August 16, 1875, which deed purports to convey one-half of the Altoona Mine, one-half of the Trinity Mine, and one-half of the Crow Creek Ditch. Also deed from Lytle, Hawkett and McCarthy to Zellerbach, dated September 8, 1875, acknowledged the same date, and recorded September 24, 1875, purporting to convey the Altoona Claim, the Trinity Claim, and the Crow Creek Ditch and water rights; to each of which said conveyances defendant, by its counsel, objected on the ground that it was immaterial, irrelevant, and incompetent. The objections were overruled by the Court; to which rulings of the Court defendant, by its counsel duly excepted; and the said ruling of the Court is hereby assigned as error.

V.

Plaintiff offered in evidence the deed dated August

16th, 1877; by which the Boston Cinnabar Mining Company conveys to the Altoona Quicksilver Mining Company, in consideration of five hundred dollars, that certain ditch situatud in Trinity County, State of California, commencing at the Crow Creek and running thence to the Wiltz Ravine and thence to the mining property of the party of the first part, to wit, the Boston Cinnabar Mining Co., the same being one and a half miles long, more or less, and known as the Boston Cinnabar Mining Company's Ditch, which deed was duly acknowledged August 16, 1877, and recorded in the County Records of Trinity County, August 20, 1877.

The deed was objected to by defendant on the ground that it was void, as it appeared that it was made after the grantor had ceased to use the water. The objection was overruled, and deed admitted in evidence, to which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

VI.

Plaintiff identified by witness M. D. Butler a letter received by him shortly after it was written, which letter reads as follows:

"Jan. 10th, 1889.

"Mr. M. D. Butler, Cinnabar,

"*Dear Sir:* The Altoona Quicksilver Mining Com-
" pany hereby grants you permission to use the water
" out of the ditches belonging to the above-mentioned
" company this spring, and until such a time as the
" company shall have use for the same, due notice of

" which you will receive from the undersigned. In " consideration therefor you agree to keep the ditches " in good order and repair, without any charge to this " company. Please give me in writing your concurrence " thereto.

" Yours truly,

" CHARLES ALLENBERG,

" Secretary Altoona Quicksilver Mining Company."

To which counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent. Objection was overruled by the Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

VII.

Plaintiff identified by witness Butler a certain letter written and mailed by him at the date thereof, and received by Charles Allenberg shortly after, and offered it in evidence, which letter reads as follows:

" CINNABAR MINING DIST.,
" TRINITY CO., Jany. 29, '89.

" CHAS. ALLENBERG, Esq.:

" *Dear Sir:* I am in receipt of yours of 22nd inst· " inclosing permit to use water out of ditches belonging " to Altoona Quicksilver Mining Company, and in con- " sideration I agree to keep said ditches in good order " and repair at my own expense, and keep possession of " same for said company subject to your order.

" Yours truly,

" M. D. BUTLER."

Counsel for defendant objected, on the ground that it was immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

VIII.

Witness M. D. Butler testified as follows: That in 1890 and 1891 he was operating for the Altoona Quicksilver Mining Company and was their general manager and superintendent up there. That the work done on the Loring Claim was done with water from the Altoona Ditch. I was not there at the time. I only saw what had been done. That about three-fourths of an acre has been sluiced off the Trinity and Altoona claims. That up to the time witness left, the ledge had been worked to the depth of 120 feet, and there was 800 or 900 feet of tunnel in hard rock.

Plaintiff then asked the following question: "Do you know how much ore had been taken out of that mine up to the time that you left?"

Objected to by defendant as immaterial, irrelevant, and incompetent; objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted; and the said ruling of the Court is hereby assigned as error.

The witness answered as follows. About 12,000 flasks of quicksilver from the Altoona and Trinity claims. A flask of quicksilver is 76½ pounds.

IX.

Counsel for plaintiff then asked said witness, M. D. Butler: Do you know what the value of quicksilver has been during those times?

Objected to by defendant as immaterial, irrelevant, and incompetent; objection overruled by the Court, to which ruling defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

Witness answered: At one time $115.00 a flask, and from that down to $45.00.

X.

Said witness, M. D. Butler, testified that he had often been in the Altoona mine and tunnel.

Plaintiff asked of said witness the following question: State whether or not the ore body appears on the bottom of the tunnel?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: It does for nearly 600 feet.

XI.

Plaintiff then asked said witness, M. D. Butler: How wide is that ore body?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled, to which ruling

of the Court defendant duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: It varies from 4 feet to 22½; that was apparent in the bottom of the tunnel, right through there, and all of the work has been done above the level of the tunnel.

XII.

The said witness, M. D. Butler, testified that he sluiced on the Boston Mine in 1886 and 1887 with water from the Boston Ditch. That he relocated the Boston Mine September 10th, 1885, and it was after that that he used the water.

Plaintiff then asked the following question: Did you have any controversy with the superintendent of the Altoona Company about your right to use that water?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court defendant, by its counsel, duly excepted, which said ruling of the Court is hereby assigned as error.

The witness answered: I did, with Louis Girard, who was the representative of the Altoona Quicksilver Mining Co., on the ground, about the use of the ditch and water.

XIII.

Plaintiff then asked said witness, M. D. Butler: What did he say to you about it?

To which question defendant objected as immaterial, irrelevant, and incompetent. Objection was overruled; to which ruling of the Court defendant, by its counsel,

duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered: He came on the ditch and told me I must stop using the water of the ditch ; that it was the property of the Altoona Company.

XIV.

Said witness, M. D. Butler, further testified: That the defendant took possession of the Boston Mine some time in 1891 or 1892. That the witness turned the water out of the Boston Ditch so that it would go down to the head of the Altoona Ditch, for the purpose of keeping the water running continuously at the Altoona Mine, on August 9, 1892, and posted a notice that the Altoona Company claimed the ditch and water right, and forbidding any person trespassing upon those properties, and also about the 17th of August. I needed all of the water at those times for use on the Altoona Mine. That two days after the witness turned the water out of the Boston Ditch the McCaws turned it back into the Boston Ditch again. That they continued to use it afterwards that season at the Boston Mine.

Question by Plaintiff. What happened after that between you and any officer of the Integral Company, and what conversations occurred between you and any officer of the Integral Company, with regard to the use of this water, if any ?

Answer. I met Professor McCaw on the trail one day. He was going out to the railroad and I was coming in. He protested against my interfering with the

water, and warned me that if I continued that interference, his gang would string me up.

Counsel for defendant moved to strike the answer of the witness out, because it had nothing to do with the case.

The motion was denied by the Court, to which ruling of the Court defendant, by its counsel, duly excepted, and the said ruling of the Court is hereby assigned as error.

XV.

Plaintiff's witness, F. H. Loring, testified: That in 1881, 1882, and 1883 he used the water by arrangement with the Altoona Company; also in 1884. In this connection plaintiff offered in evidence a certain agreement, identified by witness, having first proved the genuineness of the signature of F. H. Loring and E. L. Goldstein, and also having proved that at that time said Goldstein was president of the Altoona Quicksilver Mining Company.

Counsel for defendant objected to the introduction of said agreement in evidence on the ground that the same was irrelevant, immaterial, and incompetent. Objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Said agreement reads as follows, to wit:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second part "is requisite for the working of the quicksilver mine "of said first party, and may use the iron pipe of said "second party for the purpose of conducting said water "to the mine of said first party, and in consideration "thereof the said party of the first part agrees to give "and pay to the said party of the second part one-third "of the net proceeds of the mine of said party of the "first part so worked by him. The party of the second "part is to incur no liability or expense whatever in case "there shall be no proceeds from working said mine, and "the party of the first part is not to pay to the party of "the second part any compensation whatever for the use "of said water and pipe unless and until after all the "expenses of working said mine shall have been paid "out of the proceeds thereof. This agreement is not to "continue after the expiration of the year 1882.

"In witness whereof, the party of the first part and "of the second part have executed this instrument the "31st day of May, 1882.

"E. L. Goldstein,
"President Altoona Q. Mg. Co.
"F. H. Loring,
"Davis Cinnabar Mine."

XVI.

Plaintiff also had identified and proved the genuineness of the signature, and that at the date of the instrument said E. L. Goldstein was president of the Altoona

Quicksilver Mining Company, and offered in evidence a certain agreement; and defendant, by its counsel, objected to the introduction in evidence of said agreement, on the ground that the same was irrelevant, immaterial, and incompetent. The objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

The said agreement reads as follows:

"This agreement, made and entered into between F. "H. Loring, party of the first part, and the Altoona "Quicksilver Mining Company, a corporation, party of "the second part,

"Witnesseth: That the said party of the second part "agrees that the party of the first part may have what- "ever water belonging to said party of the second "part is requisite for the working of the quicksilver "mine of said first party, and may use the iron pipe of "said second party for the purpose of conducting said "water to the mine of said first party, and in considera- "tion thereof the said party of the first part agrees to "give and pay to the said party of the second part "one-third of the net proceeds of the mine of said party "of the first part so worked by him.

"The party of the second part is to incur no liability "or expense whatever in case there shall be no proceeds "from working said mine, and the party of the first part "is not to pay to the party of the second part any com- "pensation whatever for the use of said water and pipe, "unless and until after all the expenses of working said

" mine shall have been paid out of the proceeds thereof.

" This agreement is not to continue after the expiration " of the year 1883.

" In witness whereof, the party of the first and of the " second part have executed this instrument this sixth " day of March, 1883.

" E. L. GOLDSTEIN,
" President Altoona Quicksilver Mg. Co.
" F. H. LORING,
" Davis Quicksilver Mine."

XVII.

Witness J. F. Cox, on cross-examination, testified That while he was superintendent he put some boxes in the Altoona Ditch and covered them over, six inches square. That there was a string of 20 or 30 boxes. That they were put in for the purpose of giving water during the winter months. The boxes were there yet. That they probably extended three hundred feet. They extended from the Altoona Ditch to the furnace into two different tanks, 300 feet or a little more. That the water that was coming down the ditch for the last year was water that ran through those boxes. That after putting in the boxes he filled in the ditch on each side and covered the boxes over to prevent the water from freezing.

On redirect examination of said witness, plaintiff elicited evidence tending to prove: That the water carried through those boxes was the water used to supply the engines of plaintiff for steam purposes, and to the condensers for the purpose of condensation. That the boxes

were put in the immediate center of the ditch at the extreme lower end of the ditch, immediately at the mine.

Counsel for plaintiff thereupon asked the witness the following question:

"What other uses could be made of that water at the Altoona mines by the Altoona Company?"

Question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. Objection overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: "It can be put to pumping, hoisting, producing electric power, and so forth.

XVIII.

Counsel for plaintiff then asked of said witness Cox the following question: State whether or not all those purposes are necessary and useful in the working of the mine?

To which question counsel for defendant objected on the ground that the same was incompetent and immaterial. Objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: They are both necessary and useful.

XIX.

Plaintiff's witness, J. M. Gleaves, testified: That he had measured the capacity of the Boston and Altoona

ditches to carry water. That the capacity of the Boston Ditch is 618 inches, measured under a 4-inch pressure. The Altoona Ditch, run its full capacity, is about 1000 miner's inches.

Counsel for plaintiff asked the following question: State to the jury whether or not you made surveys for the purpose of ascertaining the elevation of the lower end of the ditch (the Boston Ditch) above the collar of the shaft in the hoisting works of the Altoona Mine?

This question was objected to by counsel for defendant as immaterial, irrelevant, and incompetent. The objection was overruled by the Court; to which ruling of the Court defendant, by its counsel, then and there duly excepted; and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: I took the elevation between the collar of the shaft and the mouth of the Altoona Ditch, and found about 43 feet difference in the elevation.

XX.

That between the collar of the shaft and the Boston Ditch, on the point of the little hill above the mine, the difference was a fraction less than 162 feet. That the collar of the shaft is the main level of the floor in the hoisting works. That the shaft is used for hoisting ores and for general working purposes of the mine, and for pumping.

All this testimony was given under the objection of defendant as being incompetent, irrelevant, and immaterial, and was admitted by the Court subject to the exception of the counsel for defendant to the ruling of the

Court, and the said ruling of the Court is hereby assigned as error.

XXI.

Also the following testimony was given under the same objection, ruling, and exception:

That there is a cage used for hoisting ore and for taking men up and down in the mine. That it is operated by steam power for that purpose. That it runs perpendicularly. Mining timbers have to go up and down that shaft. That the collar of the shaft is the upper end—the top. That that is where the cages come to the surface and discharge. That the cages are stopped at the collar of the shaft, and the cars loaded with ore are run off and taken out where they are placed in retorts and furnaces. That the shaft had been sunk when witness was there about 240 feet. That when witness was there they were drifting or working at the bottom. That when the level at 240 feet had been worked a good miner would go down and sink the shaft deeper.

And the said ruling of the Court is hereby assigned as error.

XXII.

Louis N. Girard, witness for plaintiff, testified: That in 1886 he had charge of the Altoona mining properties.

Counsel for plaintiff asked the witness the following question:

During the year 1886 did you make any arrangement for the company with the Butlers in regard to the use of the water of the Boston Ditch ?

This question was objected to by counsel for defendant

as irrelevant, immaterial, and incompetent, which objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

The witness answered to this question: I let Mr. Butler use the water for the repairing of the ditch, keeping it up in repair; he agreed to put the ditch in repair for the use of the water. I made that arrangement in the interest of the Altoona Quicksilver Mining Co., as its representative.

XXIII.

Plaintiff's witness, Charles Allenberg, testified: That he was the general manager of the affairs of the corporation plaintiff since 1887.

Plaintiff asked said witness the following question:

During that time what has been your intention as the general manager of the corporation, with regard to holding the corporation's rights to these ditches and water rights?

Which question was objected to by counsel for defendant, as immaterial, irrelevant, and incompetent.

The objection was overruled by the Court; to which ruling of the Court, counsel for defendant, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered. Always intended to hold our rights to those ditches.

XXIV.

Plaintiff then asked said witness the following question:

In the same connection, what has been the intention with regard to the Boston Ditch and the water right used with the Boston Ditch, since the date of the deed from the Boston Company to the Altoona Company in ?

To which question counsel for defendant objected, on the ground that the same was immaterial, irrelevant, and incompetent, which objection was overruled by the Court, to which ruling of the Court counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To this question the witness answered: Always intended to hold our right to the ditch and the water right.

XXV.

Plaintiff then asked said witness the following question:

And what in the same connection with regard to the Altoona Ditch and the right to divert water through it?

Same objection, ruling and exception, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: The same.

XXVI.

Plaintiff then asked said witness:

What use could be made of the water through the Altoona and Boston ditches for the purposes of that

company other than what it has actually been appropriated to?

Objected to by counsel for defendant, on the ground that it was irrelevant, immaterial, and incompetent, and purely speculative.

Objection overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Answer. We could use the water for water power, to run our machinery by water power.

XXVII.

Plaintiff then asked said witness the following question:

What advantages would you have as to power when you could bring the water through the Boston Ditch over what you would have in bringing the water through the Altoona Ditch?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. The difference in the elevation; could get so much more power through the Boston Ditch than through the Altoona Ditch; the higher elevation gives more pressure.

XXIX.

Plaintiff then asked the witness the following question:

What benefits would accrue to the company from using this water for power over obtaining power by other means which could be used?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. It would save us from using steam power, and consequently save a good deal of wood to make steam for the boilers. It would also save an engineer.

XXX.

Plaintiff then asked said witness the following question:

How much expense per month would it save the company during such months as it would furnish power?

Same objection, ruling, and exception, and the said ruling of the Court is hereby assigned as error.

Answer. It would save some $600 per month during such time as we had the water power.

The counsel for defendant moved to strike out the answer. Motion denied; to which ruling the counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXI.

Plaintiff then asked said witness the following questions:

Question. Did you see Mr. M. D. Butler in this city during the years 1886 and 1887, from time to time?

Answer. Yes, sir; at my office on Brannan St.

Question. Did you have any conversation with him at those times with regard to the use of the Boston Ditch and the water there?

Question objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled; to

which ruling of the Court defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Answer. Mr. Butler came to me on several occasions and asked me for the use of the water for sluicing boxes and some for iron pipes; and I always gave him permission to use our water for sluicing boxes or iron pipes. He wanted to use the water on the Boston mines, and naturally wanted to use the water of the Boston Ditch. That was the only ditch that would carry the water on that mine so far as I know.

XXXII.

Counsel for plaintiff then offered in evidence the patent of the United States to the Altoona Quicksilver Mining Co., for the Altoona Quicksilver Mining Claims dated June 21st, 1895. Which patent was objected to by defendant as immaterial, irrelevant, and incompetent, and as having been issued subsequent to the commencement of this action. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXIII.

Said witness Allenberg further testified:

That the Altoona and Trinity quicksilver mines had not been worked out in 1885. That the steam hoisting and pumping works and the reduction works which are now on that property were built in 1894. That they were commenced about June, 1894, and completed about December, 1894.

Plaintiff then asked the witness the following question:

What amount of quicksilver has the mine produced since that time—since you commenced putting up those works, which you say you commenced putting up about a year ago?

Objected to as immaterial, irrelevant, and incompetent, and referring to matters occurring since the commencement of this cause. Objection overruled to which ruling of the Court the defendant by its counsel then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

Witness answered: About $71,000 worth.

XXXIV.

Counsel for plaintiff then asked witness the following question:

To what depth has the mine been worked?

Objected to as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Two hundred and thirty-one and a half feet.

XXXV.

Plaintiff then asked the said witness, Allenberg, the following question:

What is and has been the intention of the company and of yourself as general manager of the company,

with regard to the working and development of that mine since the year 1880?

Objected to as irrelevant, immaterial, and incompetent. Objection overruled; to which ruling of the Court the defendant, by its counsel, then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question the witness answered: Since 1880 we contemplated to work the mine, as we are doing now, but we were unable to do so until last year on account of litigation between the stockholders of the Altoona Quicksilver Mining Co.

Mr. Campbell, Counsel for Defendant. I move to strike that answer out. Motion denied by the Court; to which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

XXXVI.

Counsel for plaintiff then asked said witness the following question:

What amount of money was expended by the Altoona Quicksilver Mining Co. in the operation and development of its properties in the Cinnabar Mining District in Trinity county, California, from the time the Company took possession of the property up to the commencement of this suit?

Objected to by defendant as immaterial, irrelevant, and incompetent. Objection was overruled by the Court; to which ruling counsel for defendant then and there duly excepted, and the said ruling of the Court is hereby assigned as error.

To which question witness answered: About $257,000.

XXXVII.

The Court erred in charging the jury as follows:

"To abandon such right is to relinquish possession "thereof without any present intention to repossess. To "constitute such an abandonment there must be a con- "currence of act and intent, viz: The act of leaving the "premises or property vacant so that it may be ap- "propriated by the next comer, and intending not to "return."

XXXVIII.

The Court erred in charging the jury as follows:

"The mere intention to abandon if not coupled with "yielding up possession or cessation of user is not suf- "ficient; nor will the nonuser alone without an intention "to abandon be held to amount to an abandonment. "Abandonment is therefore a question of fact. Yield- "ing up possession and nonuser are evidences of abandon- "ment, and under many circumstances sufficient to war- "rant the deduction of the ultimate fact of abandonment. "But it may be rebutted by evidence which shows that "notwithstanding such nonuser or want of possession the "owner did not intend to abandon it."

XXXIX.

The Court erred in charging the jury as follows:

"Use of the ditch and water by any other person by "permission of the owner is sufficient to maintain the "owner's possession, or right of possession, as though it "were used by the owner."

XL.

Counsel for defendant also excepted to the charge of the Court, on the ground that the Court in his charge to the jury omitted one of the elements of abandonment in this:

"That one of the elements of abandonment is left "entirely out—that is, no matter how strong the inten- "tion is to use the water, or take the use of the water, "or continue to use it at another time, still, if at an- "other time they do not use it, or begin to use it, or "commence work looking to the use of it in the near "future, that, then, is abandonment, no matter how "strong their intention in the future is. They must do "some active work applying the water to that use, or "some other beneficial use."

And said omission from said charge of the Court is hereby assigned as error.

XLI.

The Court erred in refusing to charge the jury at the request of the defendant as follows, to wit:

"The use required by the statute to entitle a "person to the waters of a stream must be an actual "use for some beneficial purpose. It is not "sufficient, under the law, that there be sim- "ply a claim to the water without any use. And "if you find from the evidence, that the plaintiff, the "Altoona Quicksilver Mining Company did not, since "the year 1881, use any of the waters that ran through "the Boston Ditch, and did not in good faith intend to

" use them, but allowed the ditch to go to ruin and " decay, so that the same could not be used as a ditch, " but claimed the Boston Ditch and water right for the " sole purpose of preventing others from using said water " for a beneficial purpose, I charge you that such a " claim is not sufficient to entitle the plaintiff to the " possession of said ditch in this action, and you should " find for the defendant upon that branch of the case."

XLII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit:

" No appropriation of water can be made for purely " speculative purposes, and the right to use water can " only be acquired for the purpose of applying it to a " beneficial purpose, and as soon as the purpose ceases, " the right to use the water ceases at once, unless the " appropriator, within a reasonable time, takes active " steps to apply said water to another beneficial use.

" A person cannot hold the right to use water against " the subsequent appropriator by an intent formed in " the mind to, at a future date, put the water which he " has ceased to use to another and different purpose or " use, unless he begins active work upon the new use " within a reasonable time after he has ceased to use the " water for the original purpose, and prosecuted the " same diligently to a conclusion. The law does not " permit a person to hold water for speculative purposes, " and no matter how good the intentions of the appropri- " ator may be to use water for a beneficial purpose in " the future, still, he is only allowed a reasonable length

" of time, consistent with the magnitude of the work " necessary to use the water, and his diligent and rea- " sonable exertions to complete the work."

XLIII.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit :

" By Act of Congress, the Government of the United " States has given to the appropriators and users of " waters the right to run their canals and ditches over " the vacant and public lands of the United States. " The right to run canals and ditches does not give the " party building the same any title to the land, except " the right of way across it. The right is merely an " easement and continues only so long as the ditch is ' used to convey water for a needful and beneficial pur- " pose, and whenever the party who built the ditch, or " his successors in interest, ceases to use the same, for an " unreasonable length of time, for the purpose of con- " veying water to be used for a needful purpose, then the " rights of the party who built the ditch, or his succes- " sors in interest, ends, and any person may enter into " and upon said ditch, and use the same to convey water " for the purpose of applying it for a beneficial use, and " the party who built the ditch, or his successors in in- " terest, cannot complain."

XLIV.

The Court erred in refusing to charge the jury, at the request of the defendant, as follows, to wit :

" The test of the right to water in this State is gov-

" erned by appropriation, use, and nonuse. The right of " a party to use water for a beneficial purpose continues " as long as the water is actually applied to that use, or " to some other beneficial use, and terminates when " the use is discontinued. The original use, however, " cannot be changed by the original appropriator or his " successor in interest to the detriment of a subsequent " appropriator, nor can the original appropriator or his " successors in interest assert, against a subsequent " appropriator, his intent to change the use of the water " to another purpose, which will be injurious to a subse- " quent appropriator, unless the first appropriator has " done some act and used due diligence within a reason- " able time towards the making of said change prior to " the appropriation of said water by another person. If " the purpose for which the water was originally appro- " priated has failed, the first appropriator cannot hold " that water indefinitely for any other purpose, unless " he takes active steps to do so within a reasonable time, " and before others have appropriated the water. The " doctrine is that no man shall act upon the principle of " the dog in the manger, either in the appropriation of " water, for which he has no present use, or in the hold- " ing of water which he has ceased to use."

E. W. McGRAW,

Attorney for Defdt.

[Endorsed]: Filed December 30, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO., Plff,

vs.

INTEGRAL QUICKSILVER MINING CO., Deft.

Order Affixing Amount of Bond.

Ordered: That the bond of defendant on Writ of Error be, and the same is hereby, fixed at five hundred dollars, and if supersedeas be sought, in one thousand dollars additional.

San Francisco, Jan. 21, 1896.

McKENNA,
Judge.

[Endorsed]: Filed January 21st, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING CO.,
Defendant.

Bond on Writ of Error.

Know all men by these presents, That we, Edward W. McGraw, of Alameda County, California, as principal, and Joseph Sloss and W. H. Palmer, as sureties, are held and firmly bound unto the Altoona Quicksilver Mining Company (a corporation), in the full and just sum of five hundred dollars, to be paid to the said Altoona Quicksilver Mining Company, its attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of January, in the year of our Lord, one thousand eight hundred and ninety-six.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said Court between the Altoona Quicksilver Mining Company plaintiff, and the Integral Quicksilver Mining Company defendant, judgment in

ejectment was rendered against the said Integral Quicksilver Mining Co., and the said Integral Quicksilver Mining Co. having obtained from said Court an order allowing a writ of error, and also a writ of error to reverse the judgment in the aforesaid Court, and a citation directed to the said Altoona Quicksilver Mining Co. is about to be issued, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the twenty-first day of February next.

Now, the condition of the above obligation is such, that if the said Integral Quicksilver Mining Company shall prosecute its Writ of Error to effect, and shall answer all costs that shall be awarded against it if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD W. MCGRAW, [SEAL]
JOS. SLOSS, [SEAL]
W. H. PALMER. [SEAL]

UNITED STATES OF AMERICA,
Northern District of California, } ss.
City and County of San Francisco.

Joseph Sloss and W. H. Palmer, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOS. SLOSS,
W. H. PALMER.

Subscribed and sworn to before me this 21st day of January, A. D. 1896.

[SEAL] LINCOLN SONNTAG,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Bond on Writ of Error. Form of bond and sufficiency of sureties approved. Joseph McKenna, Judge. Filed Jany. 22d, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ALTOONA QUICKSILVER MINING CO.,
Plaintiff,
vs.
INTEGRAL QUICKSILVER MINING CO.,
Defendant.
No. 11872.

Certificate to Transcript.

I, W. J. Costigan, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written pages, numbered from 1 to 161, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of the foregoing return to Writ of Error is $96.\frac{80}{100}$, and that said amount was paid by the Integral Quicksilver Mining Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 25th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL] W. J. COSTIGAN,

Clerk United States Circuit Court, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—SS.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Integral Quicksilver Mining Company, plaintiff in error, and Altoona Quicksilver Mining Company, defendant in error, a manifest error hath happened, to the great damage of the said Integral Quicksilver Mining Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 21st day of February next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL] W. J. COSTIGAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

JOSEPH McKENNA,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 22nd day of January, 1896.

C. W. CROSS,

Attorney for Defendant in Error.

Return to Writ of Error.

The answer of the Judges of the Circuit Court of the

United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[SEAL.] W. J. COSTIGAN,
Clerk.

[Endorsed]: Writ of Error. Filed Jany. 22nd, 1896. W.J. Costigan, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Altoona Quicksilver Mining Company, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 21st day of February next, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 11872, and entitled the Altoona Quicksilver Mining Company, plaintiff, vs. Integral Quicksilver Mining Company, defendant, wherein said Integral

Quicksilver Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 22d day of January, A. D. 1896.

JOSEPH McKENNA,
Judge.

Service of within citation and receipt of a copy thereof, is hereby admitted this 22nd day of January, 1896.

C. W. CROSS,
Attorney for Defendant in Error.

[Endorsed]: Citation. Filed Jany. 22d, 1896.
W. J. Costigen, Clerk.

[Endorsed]: No. 280. In the United States Circuit Court of Appeals, for the Ninth Circuit. Integral Quicksilver Mining Company, Plaintiff in Error, vs. Altoona Quicksilver Mining Company. Transcript of Record. In Error to the Circuit Court of the United States for the Northern District of California.

Filed January 25, 1896.

F. D. MONCKTON,
Clerk.

MAP OF WATER

of the ALTOONA QUICKSILV

Showing Upper (or Boston) Ditch and Lo

Surveyed July 27th 1895 by J. M. Graves Lice

SCALE 400 ft. - 1 in.

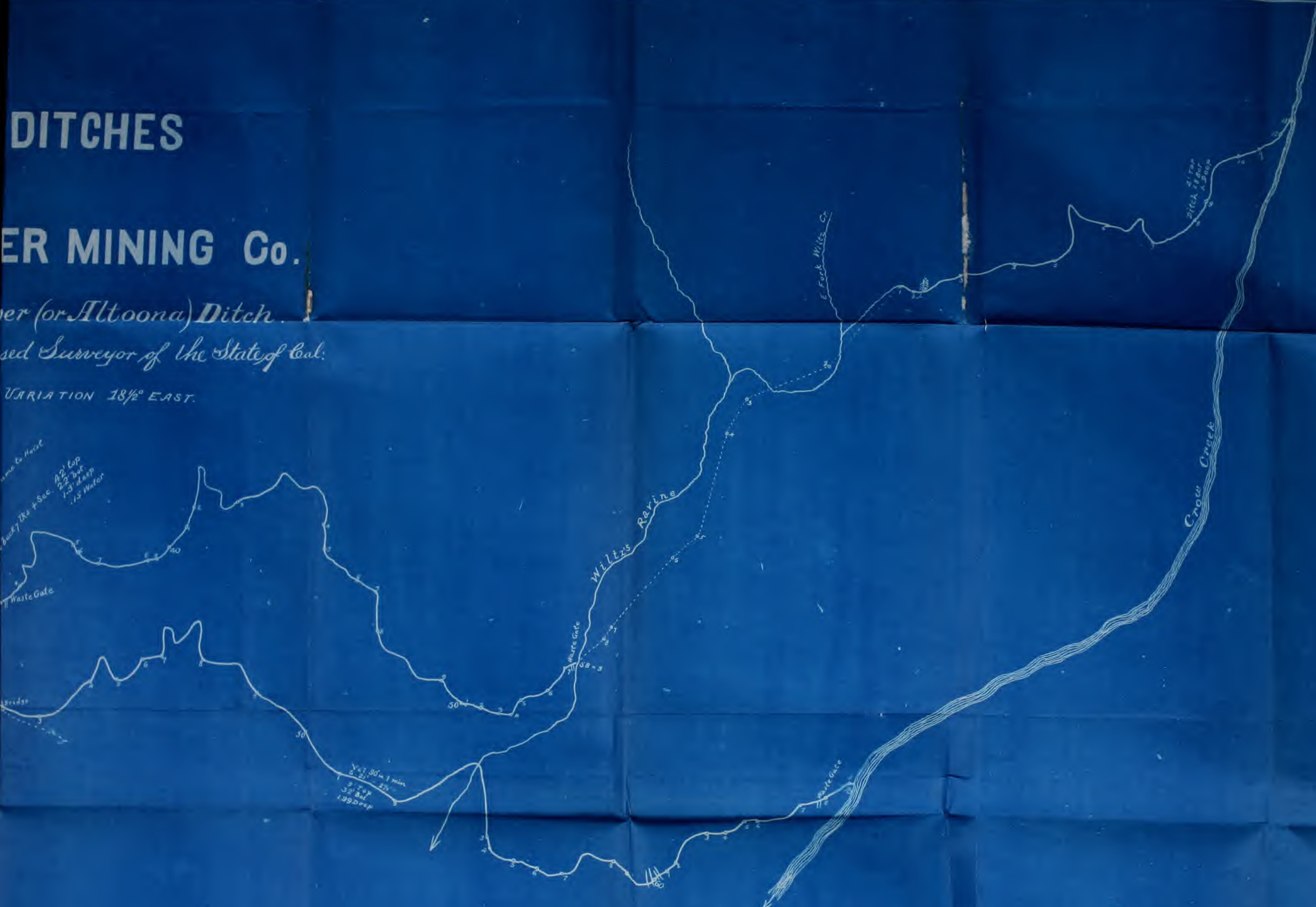
DITCHES

ER MINING Co.

er (or Altoona) Ditch.

sed Surveyor of the State of Cal:

VARIATION 18½° EAST.




MAP
OF
CINNABAR
MINING DISTRICT
in
TOWNSHIP 33N. R6W. M.D
TRINITY CO
CAL.
Scale 10 Chains to one inch
SENTINEL
INVINCIBLE
ENDURANCE
TRINITY No 3
TRINITY No 2
TRINITY No 1
WASHINGTON
TAGGART
LOST
CAMPANIA
SPAR
ASSURANCE
ROCHESTER
RUBY
AMERICA
CUNARD
VIRGINIA